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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
COURTS OF APPEALS OF OHIO

REPORTED BY
EMILIUS O. RANDALL
COURT OF APPEALS REPORTER

J. L. W. HENNEY
CLINTON COLLINS
ASSISTANT REPORTERS

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MAY 11 1918

JUDGES OF THE COURTS OF APPEALS OF OHIO.

HON. JAMES I. ALLREAD, CHIEF JUSTICE¹

HON. LEWIS B. HOUCK, SECRETARY.¹

FIRST DISTRICT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

HON. EDWARD H. JONES ²	Hamilton
HON. OLIVER B. JONES.....	Cincinnati
HON. FRANK M. GORMAN.....	Cincinnati
HON. FRANCIS M. HAMILTON ³	Lebanon

SECOND DISTRICT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

HON. ALBERT H. KUNKLE.....	Springfield
HON. JAMES I. ALLREAD.....	Greenville
HON. H. L. FERNEDING ⁴	Dayton

THIRD DISTRICT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Paulding, Putnam,
Seneca, Union, Van Wert and Wyandot.*

HON. KENT W. HUGHES.....	Lima
HON. WALTER H. KINDER.....	Findlay
HON. PHIL M. CROW ⁵	Kenton

FOURTH DISTRICT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking,
Jackson, Lawrence, Meigs, Pickaway, Pike, Ross,
Scioto, Vinton and Washington.*

HON. WILLIAM H. MIDDLETON.....	Waverly
HON. FESTUS WALTERS.....	Circleville
HON. EDWIN D. SAYRE ⁶	Athens

¹Chosen for the judicial year beginning January 1, 1917.

²Term expired February 8, 1917.

³Elected November 7, 1916, for term expiring February 8, 1923;
assumed office February 9, 1917, *vice* Judge Edward H. Jones.

⁴Re-elected November 7, 1916, for term expiring February 8,
1923.

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FIFTH DISTRICT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

HON. LOUIS K. POWELL.....Mt. Gilead
HON. LEWIS B. HOUCK.....Mt. Vernon
HON. ROBERT S. SHIELDS⁴.....Canton

SIXTH DISTRICT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

HON. CHARLES E. CHITTENDEN.....Toledo
HON. REYNOLDS R. KINKADE.....Toledo
HON. SILAS S. RICHARDS⁴.....Clyde

SEVENTH DISTRICT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga,
Guernsey, Harrison, Jefferson, Lake, Mahoning, Monroe,
Noble, Portage and Trumbull.*

HON. WILLIAM H. SPENCE².....Lisbon
HON. JOHN POLLOCK.....St. Clairsville
HON. WILLIS S. METCALFE.....Chardon
HON. LOUIS T. FARR³.....Lisbon

EIGHTH DISTRICT.

Counties—Cuyahoga, Lorain, Medina and Summit.

HON. CHARLES R. GRANT.....Akron
HON. ALFRED G. CARPENTER.....Cleveland
HON. WALTER D. MEALS⁴.....Cleveland
HON. P. L. A. LIEGHLEY¹.....Cleveland

²Term expired February 8, 1917.

³Re-elected November 7, 1916, for term expiring February 8, 1923.

⁴Elected November 7, 1916, for term expiring February 8, 1923; assumed office February 9, 1917, *vice* Judge William H. Spence.

⁵Resigned, effective March 5, 1917.

⁶Appointed March 5, 1917, *vice* Judge Walter D. Meals.

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- Act of February 4, 1887 (24 Stats. at Large, 379). Interstate commerce act. *N. Y. Cent. Rd. Co. v. Peak*, 399.
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- Section 1558-6, General Code (103 O. L., 280). Jurisdiction of Cincinnati municipal court. *Keck, Exr., v. Bahlke*, 247.
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- Section 2410, General Code. County commissioners; employees. *State, ex rel., v. Commissioners*, 444.
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- Section 3664, General Code. Municipalities; powers; public peace. *Bader, Supt., v. McCartin*, 78.
- Section 3812, General Code. Assessments; methods of computation. *Kelly v. Cincinnati*, 468.
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- Section 8308, General Code. Mechanics' liens; application. Rule v. Automatic News Co., 451.
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- Section 8573, General Code. Descent and distribution; ancestral property. Beight v. Organ et al., 283.
- Section 8574, General Code. Descent and distribution; nonancestral property. Beight v. Organ et al., 283.
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- Section 10722, General Code. Executors and administrators; when claim barred. Keck, Exr., v. Bahlke, 248.

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- Section 11204, General Code. Probate court; fees. *Haserodt v. State, ex rel.*, 358.
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- Sections 11343-1 and 11343-2, General Code. Pleadings; impartial report privileged. *Heimlich v. Dispatch Printing Co.*, 394.
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- Section 12075, General Code. Assessments; injunction. *Kelly v. Cincinnati*, 466.

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- Andrews et al. v. Beigel, Receiver, et al. (427). Motion to certify record overruled and motion to dismiss petition in error sustained, May 9, 1916.
- Board of Township Trustees of Wilson Township v. Gilbert et al. (39). Motion to certify record overruled, April 9, 1915.
- Charville v. The State of Ohio (236). Motion for leave to file petition in error overruled, January 30, 1917.
- Cincinnati & Columbus Traction Co. et al. v. Murphy, Admr. (1). Motion to certify record overruled, May 5, 1914.
- Cleveland Wire Spring Co. v. General Accident, Fire & Life Assurance Corporation, Ltd. (344). Motion to certify record overruled, July 3, 1917.
- Duncan, Receiver, v. Kiger (57). Motion to dismiss sustained, July 1, 1916.
- Ewalt, Admr., v. Ames et al. (374). Motion to certify record overruled, December 19, 1916.
- Fisher v. Whittus et al. (415). Motion to certify record overruled, October 9, 1917.
- Graff v. Graff (260). Pending in supreme court on motion to certify and on motion to dismiss petition in error. See 7 Ohio Appellate Reports for annotation.
- Joslin-Schmidt Co. v. The Baltimore & Ohio Southwestern Railroad Co. (103). Motion to certify record overruled, May 29, 1916.
- Kammann et al. v. Kammann et al. (455). Dismissed on ground that no constitutional question involved, June 26, 1917 (96 Ohio St., 600).
- Kanawha & Michigan Railway Co. v. The Court of Common Pleas et al. (244). Motion to certify record overruled, November 28, 1916.
- Leen, Admr., v. Leen (254). Motion to certify record overruled, November 21, 1916.
- Mateer, Exr., et al. v. Croft et al. (13). Motion to certify record overruled, April 3, 1917.
- Nasby Building Co. v. The Walbridge Building Co. (104). Motion to certify record overruled, June 12, 1917.

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Nussdorfer, Auditor, v. The State, ex rel. Miller (121). Motion to certify record overruled, November 21, 1916.

Parthe et al. v. Parthe et al. (317). Motion to certify record overruled, July 12, 1917.

R. K. LeBlond Machine Tool Co. v. The Humboldt Fire Insurance Co. (313). Judgment affirmed, April 3, 1917, *Humboldt Fire Insurance Co. v. The R. K. LeBlond Machine Tool Co.*, 92 Ohio St., 541 (without opinion). See, also, opinion in 96 Ohio St., 442.

Rogers, a Taxpayer, v. The City of Cincinnati (218). Motion to certify record overruled, July 3, 1917.

Schott, Sheriff, v. Benckenstein et al. (63). Judgment affirmed, April 9, 1915, *Benckenstein et al. v. Schott, Sheriff*, 92 Ohio St., 29 (opinion).

Simms, Admx., v. The Stark Electric Railway Co. (264). Motion to certify record overruled, January 23, 1917.

State, ex rel. Landis, v. The Board of Commissioners of Butler County et al. (440). Judgment affirmed, January 9, 1917, *State, ex rel. Landis, v. Board of Commissioners of Butler County et al.*, 95 Ohio St., 157 (opinion).

CASES
ARGUED AND DETERMINED
IN THE
COURTS of APPEALS of OHIO

THE CINCINNATI & COLUMBUS TRACTION CO. ET
AL. v. MURPHY, ADMR., ETC.

*Negligence—Comparative negligence—Contributory negligence—
Course of employment—Scope of duties—Presumption as to
freedom from negligence.*

1. When the evidence establishes the negligence of an employer, and the circumstances of the death of an employe show negligence on the part of the deceased, the question of the degree of negligence of each becomes one for the jury under proper instructions from the court.
2. Where an employe reported for duty at the usual time, was at the place where during working hours his work for the day was to be performed, and came in contact with the wires which caused his death by electrocution within less than ten feet of the machine upon which he was to work as soon as the foreman finished his breakfast, it cannot be said as a matter of law that he was not acting at the time within the scope of his employment. The question is one of fact to be submitted to the jury under proper instructions from the court.
3. In a suit by an administrator of a deceased employe for damages on account of the alleged negligence of the employer, which negligence it is charged caused such death, the law presumes at the outset of the case that both parties are free from negligence.

(Decided February 12. 1914.)

ERROR: Court of Appeals for Hamilton county.

Mr. C. B. Matthews and Mr. Harry Klein, for plaintiffs in error.

Mr. Daniel W. Murphy and Mr. Thomas L. Michie, for defendant in error.

JONES, E. H., J. This action was brought in the court of common pleas by defendant in error, Daniel W. Murphy, as administrator of the estate of Otto Smith, deceased, for damages on account of the death of the intestate, caused, as alleged in the petition, by the negligence of the plaintiff in error, The Cincinnati & Columbus Traction Company, of which company the decedent was at the time of his death an employee. He had been called from his usual work as a bridge carpenter in the employ of said company to assist in the repair of the generator of said company at its substation at Madeira—a station on the line of said company's road. The machinery of this substation had been burned out during a storm, by reason of which an emergency had arisen requiring an extra number of men to string wires and do other work necessary to restore normal conditions so that the cars could be operated over the road.

The petition alleges that while so employed at said time and place the plaintiff's said intestate was electrocuted, and that his death was caused by physical contact of both his hands with two wires which the defendant then had at its said station and which were used to charge its generator.

The facts as shown by the evidence are, that the storm which resulted in the damage took place on

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a certain Saturday evening, and that during the whole of the following day, Sunday, the decedent, together with the other employes called upon, was engaged in stringing wires at the said place; that he worked until the evening of said day; and that he then went to his home and returned on the following morning at about the usual hour of beginning work to resume his labors at said substation. His foreman, at the time of or shortly after decedent's arrival, went to the second floor of the building in which the power machinery was located to eat his breakfast with the family of the station agent who occupied said floor as his home. The work on the previous day consisted in part in stringing wires from a box car some little distance away from the substation, in which a generator had been temporarily placed, to the machinery in the first floor of this substation. These wires were taken into the building at or near one of the windows in the second story and were carried down to the first floor along the wall upon one side of the stairway leading to the rooms above. It was while waiting for the foreman to finish his breakfast that the decedent in some manner came in contact with these wires, and by reason thereof came to his death.

The negligence complained of in the petition is that the defendant company left said wires without any insulation, and unguarded, that the intestate had no knowledge that they were charged with an electric current and no warning was given him of the danger, and that he was not aware nor had he any means of knowing of such danger.

The trial below resulted in a verdict for the

plaintiff, defendant in error here, upon which judgment was afterwards rendered, and it is to reverse that judgment that this proceeding in error is prosecuted.

It is contended in the brief for plaintiff in error, first, that the decedent's death was the result of his own wilful and deliberate act; in other words, due solely to his own negligence.

The evidence in the case fully establishes the negligence of the traction company. The evidence shows that when the intestate quit his work on Sunday evening and left for his home the current was not turned on and these wires were not charged. There is some little conflict upon this point, but the evidence in favor of this view greatly preponderates. In fact, about the only evidence to the contrary is that of Mr. Charles E. Smith, the foreman above referred to, whose testimony is on page 57 of the bill of exceptions:

"Question: Can you say whether Otto Smith knew that those wires were charged on Monday morning or not?

"Answer: He should have known it; he knew that they would have to be charged to run the road or to run the rotary, and he knew that they were charged on Sunday evening before he left there, because we started up the machinery before he left."

But the same witness (bill of exceptions, page 48) had previously stated:

"Answer: No sir, there was no current in those wires on Sunday."

The negligence of the defendant company having been proven, and granting that the circumstances

of the death showed negligence on the part of decedent, the question of the degree of negligence of each became one for the jury, by the provisions of Section 6245-1, General Code, under proper instructions from the court.

The charge of the court seems to us to contain a full and clear explanation to the jury of the rule with reference to the doctrine of comparative negligence. Such being the case, we have no authority to disturb the verdict of the jury even though the evidence might tend to show negligence on the part of the plaintiff's intestate.

Another point urged by counsel for plaintiff in error in argument is that at the time of the accident the decedent was not acting for the defendant traction company within the course of his employment or the scope of his duties. The evidence bearing upon this point has been summed up in what was said above with reference to the time of the accident and the place where it occurred. The decedent came in contact with the wires which caused his death within less than ten feet of the machine upon which he was to work as soon as the foreman finished his breakfast. The lips of the decedent having been instantly sealed by death, no one knows or ever will know just why he was upon the stairway at the time, and no satisfactory inference can be drawn. He may have been on his way to ask his foreman some question with reference to his work, or it is possible that he expected to rest upon the steps while waiting. In either event we think the jury would be justified in finding that he was acting within the scope of his employment; and plaintiff having shown that decedent had re-

ported for duty at the usual time, and that he was at the place where during working hours his work for the day was to be performed, we think it cannot be said as a matter of law that he was not acting, at the time, within the scope of his employment, and was not about his master's business. The supreme court of Ohio, in the case of *Lima Ry. Co. v. Little*, 67 Ohio St., 91, has held that this question is one of fact to be submitted to the jury under proper instructions from the court.

The third point urged in the brief, namely, that the jury and court cannot guess as to the liability of the defendant, is disposed of by what has been said above. There was ample evidence tending to show negligence on the part of defendant. The law presumes at the outset of the case that both parties are free from negligence, and the plaintiff below as well as the defendant had the benefit of this presumption. There having been evidence of negligence on the part of defendant, and assuming that the jury would be warranted in finding that the plaintiff's intestate was also negligent, and the relation of master and servant or employer and employe having been shown, the case was one for submission to the jury under the authority of the section of the General Code above referred to.

We find no error in the proceedings in the court below, and believe that substantial justice has been done.

Judgment affirmed.

JONES, OLIVER B., J., concurs.

SWING, J., not participating.

BROERMANN, JR., v. KESSLING ET AL.

Wills—Construction—Devise to grandchildren—Per capita and per stirpes distribution—Rule of distribution when proportions left undetermined by testator.

1. As a general rule, where a testator has left undetermined the proportions in which his beneficiaries are to take, the courts, favoring equality, will direct the distribution to be *per capita* rather than *per stirpes*.
2. A testator devised certain real estate "to the children of Elizabeth Boewer and the children of Marianna Broermann and Frederick Broermann, all said children being my grandchildren, to have and to hold the same for the said grandchildren, their heirs and assigns forever." On the death of the wife of the testator, who was given a life estate in the real estate in question, there were, surviving her, two children of Elizabeth Boewer and twelve children of Marianna Broermann and Frederick Broermann. *Held*: That each of the fourteen grandchildren takes an undivided one-fourteenth of the real estate in question.

(Decided May 4, 1914.)

APPEAL: Court of Appeals for Hamilton county.

Mr. Wm. Jerome Kuertz, for plaintiff.

Messrs. Badger & Ulrey; Mr. C. A. Leach; Mr. William J. Creed; Mr. Jerome D. Creed; Mr. Fred P. Muhlhauser and Mr. Samuel B. Hammel, for defendants.

JONES, OLIVER B., J. This is an action for partition, heard on appeal from the court of common pleas. It is sought to partition real estate devised under clause 1 of item 3 of the will of John B. Cook, deceased. The only question in the case is

whether the devisees named in that clause take *per capita* or *per stirpes*.

After first giving a life estate in all of his real estate to his wife by item 3 of his will, he disposes of it after her death by separate clauses in the same item, devising different parcels of real estate to different relatives. The language in clause 1 is as follows:

"I give and devise to the children of Elizabeth Boewer, and the children of Marianna Broermann and Frederick Broermann, all said children being my grandchildren, the following real estate, to-wit: [Here follows description of property.] to have and to hold the same for the said grandchildren, their heirs and assigns forever."

The widow, Mary E. Cook, died in January, 1913, two children of Elizabeth Boewer and twelve children of Marianna Broermann and Frederick Broermann surviving her. The question is whether the Boewer children each take one-fourth of this property and the Broermann each one-twenty-fourth, or whether each of the fourteen children take one-fourteenth.

No provision was made in the will for testator's daughters, Elizabeth Boewer and Marianna Broermann, and the latter at least is still surviving, and as stated at the trial both were in life at the time of the making of the will and probably at the death of the testator.

As a general rule, where the testator has left undetermined the proportions in which his beneficiaries are to take, the courts, favoring equality, will direct the distribution to be *per capita* rather than *per stirpes*. Thus where a devise is to the children

of several persons, whether it be to the children of A and B, or to the children of A and the children of B, they take *per capita* and not *per stirpes*. Beach on Wills, 504, Section 304, and 2 Jarman on Wills (6 ed., Bigelow), 204, (1050).

Where all the persons entitled to share stand in the same degree of kin to the decedent, as, for instance, all grandchildren, and claim directly from him in their own right, and not through some intermediate relation, they take *per capita*. 1 Schouler on Wills (5 ed.), Section 538.

Wherever as a class the beneficiaries are individually named, or are designated by their relationship to some ancestor living at the date of a will, whether to the testator or some one else, they share *per capita* and not *per stirpes*, and especially if they are all of the same degree. 1 Schouler on Wills (5 ed.), Section 540, and Page on Wills, Section 558, page 648.

In *Hill, Admr., v. Bowers*, 120 Mass., 135, Chief Justice Gray, in the opinion of the court, says at page 136:

"The general rule is that by a bequest to the children of A and to the children of B, the children take *per capita* and not *per stirpes*, in the absence of words indicating a different intention. There are no such words in this will."

In the case at bar we fail to see any words indicating any intention different from the general rule as above stated. The language of the will reduces the beneficiaries to a single class, that of grandchildren, in the words "all said children being my grandchildren," and also, after description of the property, by repetition, in the use of the words "to

have and to hold the same for the said grandchildren their heirs and assigns forever." While these grandchildren are designated not by individual names, but by the fact of their parentage, they take nothing under a devise from the parent or as representatives of the parent; they take directly as grandchildren of the testator, and, being all of the same class, the general rule must apply and they must take equally or under the *per capita* rule.

In 40 Cyc., 1490, the following language is used:

"As a general rule the devisees or legatees of a will will if possible be construed to take *per capita* rather than *per stirpes*, unless the will shows a contrary intention on the part of the testator, as where the beneficiaries are to take substitutionally; and in case of doubt the statutes of descent and distribution should be followed as nearly as possible."

If it were necessary under this rule to refer to our statutes, a reading of Sections 8580 to 8583, inclusive, General Code, would convince us that if the parents of these grandchildren were his only children and had predeceased their grandfather, then these grandchildren being of the same class would under the terms of Section 8581 take by inheritance equal shares. Thus we see that the *per capita* rule would accord with the statutes of Ohio.

It is however argued properly that the entire will must be read in order to put a proper construction upon any ambiguous clause, and it is urged by counsel for the Boewers that the other three clauses in item 3 indicate an intention on the part of the testator to divide the estate equally among the original children or their representatives. The fact that Mrs. Broermann, if not Mrs. Boewer also, are

still living and take nothing under the will negatives any such argument. *McIntire v. McIntire*, 192 U. S., 116, and *Blackler v. Webb*, 2 P. Wms., 383.

The argument that clauses 2, 3 and 4 indicate a purpose on the part of testator to equalize the division of his property among the representatives of his eight children is not borne out by a consideration of those clauses. The second clause gives a piece of real estate to his sons George and Bernard, and the fourth clause gives two pieces of real estate and certain chattel property to two other sons, Louis and William, and the third clause gives to two grandchildren, each being a daughter of a deceased daughter of the testator, another piece of real estate and certain street railway stock. There is nothing in the record to show that these parcels of real estate are of equal value. The usual presumption would be that they are not of equal value. The testator however desired to so divide his property, and we are not at liberty to speculate upon his reasons for so doing; but the fact that he did so does not in any way aid us in the construction of the language employed in the first clause of the same item. It happens that Marie Catherine Funk and Louisa Eberling, the two deceased daughters named in item 3, clause 3, each had a single child surviving the life tenant, and that neither of said children being mentioned by name in said item each would take one-half; but that cannot be used as an argument that they take by representation.

Two of the cases cited by counsel for the Boewers which uphold a division *per stirpes*, to-wit, *Boolet al. v. Mix*, 17 Wend., 119, and *Houghton v. Ken-*

dall et al., 7 Allen (89 Mass.), 72, 77, are cases where an estate for life was given to the child, with the remainder over to the grandchildren, in such a way as to show an intention on the part of the testator to have the grandchildren take as representatives of their respective parents. But in all of the remaining cases cited by counsel, without exception, there have been kinsmen in different degrees of consanguinity, which would require those of the more remote relationship to take as representatives of their parents who would have been in the same class.

These cases therefore cannot control the court in the construction of the case at bar where all of the beneficiaries are grandchildren who take directly as such and not in the right of their respective parents.

A decree will therefore be entered finding that each of the fourteen grandchildren who are parties to the proceeding is entitled to an undivided one-fourteenth of the real estate described in the petition, and partition had accordingly.

Judgment accordingly.

SWING and JONES, E. H., JJ., concur.

MATEER, EXR., ET AL. v. CROFT ET AL.

Wills—Construction—Ambiguities latent and patent—Devise not defeated by deeds—Imperfectly executed and not delivered, when.

A specific devise of lands to the widow of the testator for life, with the remainder over to a designated beneficiary, is not defeated on the ground of ambiguity by reason of the execution by the testator of deeds covering the same lands, where the said deeds were not executed in accordance with law and were not delivered to the grantees and there is no proof showing or tending to show that they were placed in escrow.

(Decided December 27, 1915.)

ERROR: Court of Appeals for Morrow county.

Mr. T. B. Mateer and Mr. J. W. Barry, for plaintiffs in error.

Mr. J. C. Williamson and Mr. Benjamin Olds, for defendants in error.

HOUCK, J. This is a proceeding in error in which it is sought to reverse the judgment of the common pleas court of this county.

The plaintiffs below, Daisy D. Croft and others, brought suit against T. B. Mateer, as executor of Elmer E. Price, and others, the defendants below, alleging in a second amended petition that certain language used in the last will and testament of Jacob L. Klinefelter, deceased, with reference to the disposal of the real estate of which he died seized, and a part of which is now claimed by Lillie E. Price as the surviving widow of Elmer E. Price, deceased, is ambiguous, and praying for a construction of same; also for an order and decree in partition of the real estate described in the petition.

The defendants below filed an answer, being in substance a general denial.

Two grounds of error are relied upon by plaintiffs in error:

1. That the court below erred in holding that the language of the will in question is ambiguous.

2. That the court erred in the admission of certain testimony.

Let us determine whether or not the language in the will is ambiguous. The provision of the will under consideration is as follows:

"I give and devise to my beloved wife in lieu of her dower the farm on which we now reside, and other lands in North Bloomfield township, containing in all about two hundred and fifteen acres, during her natural life, and all the stock, household goods, furniture, provisions and all other goods and chattels which may be thereon at my decease, during her natural life as aforesaid.

"I do hereby after the decease of myself and wife and my debts are paid, I desire the balance to be given to my grandson, Elmer E. Price."

By ambiguity is meant that the words are capable of more senses than one; that there is an indistinctness or uncertainty of meaning in the language used.

Ambiguities are of two kinds, patent and latent.

A patent ambiguity is one which appears on the face of the language or the instrument; as occurs when the expressions of the language or instrument are so defective that a court which is obliged to place a construction upon them can not, placing itself in the situation of the one making them, ascertain therefrom his intention.

A latent ambiguity is one which does not appear on the face of the language used, or the instrument being considered; it exists when the words apply equally well to two or more different subjects or things.

We think that extrinsic evidence can not be used, and is not proper, where the instrument or language upon its face shows no uncertainty of intention; but where it is insensible unless this borrowed light is thrown upon it, the same may be resorted to in order to ascertain the intention of the one making the instrument.

From an examination of the words and language used by said testator can his intention be determined? We think so. If we give the words and language used the plain and common meaning applicable to same, we think the claim that upon their face they are ambiguous and not of plain meaning is not well founded.

What meaning does the language convey? To us it seems clear, plain and explicit that the testator intended to and thereby did convey the real estate in question and all his property described in said provision of the will to his wife, during her natural life, and after his decease, and the payment of his debts, and the death of his wife, all that remained of all the property described in said provision of his will was to go to and be the property of Elmer E. Price. We are of the opinion that it was prejudicial error for the court below to hold otherwise.

We think that the claim of defendants in error that the paper writing reputed to be a deed, and covering the real estate in this action, is not sup-

ported either in fact or law, because it does not conform to the requirements of Section 8510, General Code, which provides:

"A deed, mortgage, or lease of any estate or interest in real property, must be signed by the grantor, mortgagor, or lessor, and such signing be acknowledged by the grantor, mortgagor, or lessor, in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation."

It is admitted by the parties to this suit that there was but one subscribing witness to said paper writing. Therefore, it not being executed in compliance with law, it does not have the effect and force of a deed, and *is not a deed*.

We think there was prejudicial error in the court below in permitting this paper writing to be admitted in evidence, and in holding that it was a deed.

The second amended petition alleges "that said deeds [one being the deed in question] were delivered to one George R. Hosler, to be delivered by him to the grantees therein at the death of said Jacob L. Klinefelter and Catherine Klinefelter, his wife, or the survivor of them."

We have carefully read the testimony of every witness, as appears in the record of this case, and we fail to find any proof whatever in support of said allegation. In the first place, the paper writing in question was not executed as required by law, and therefore *is not a deed*. In the second place, if it had been so executed and was in fact a deed, there is an absence of proof showing or even tending to show *that it was delivered in escrow*.

From what has already been said it of necessity follows that we find prejudicial error in the record, and that the judgment of the common pleas court should be reversed. It also follows that the cross-petition in error of the defendants in error should be dismissed, and the same is hereby done.

*Judgment of the common pleas court reversed,
and cause remanded.*

SHIELDS, J., and FERNEDING, J. (sitting in place
of POWELL, J.), concur.

THE CINCINNATI TRACTION CO. v. WEBER.

*Negligence—Charge to jury—Passenger on street car, who is—
Effect of incorporating petition in charge to jury.*

1. One is a passenger in a street car who is in the act of stepping on the step or platform, the car having stopped for him; and in case of an accident when stepping on, his rights are those of a passenger. In an action for damages on account of personal injuries due to the sudden starting of a street car under such circumstances, it is not error for the trial court to refuse to incorporate in the charge to the jury a statement that to warrant a finding that the plaintiff was a passenger the jury must find that the conductor knew, or by the exercise of ordinary care should have known, that the plaintiff was about to board the car while it was at a standstill.
2. It is not error for the court to read to the jury the entire petition, which petition sets forth an element of damage not supported by any evidence, where the court, in the portion of the charge which followed the reading of the pleadings, did not make any allusion to the element of damage which

was unsupported by evidence, but on the contrary mentioned the different elements of damage which would go to make up the verdict of the jury in case they should find in favor of the plaintiff.

(Decided May 16, 1914.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Kittredge & Wilby and Mr. R. E. Simmonds, for plaintiff in error.

Messrs. Bettinger, Schmitt & Kreis, for defendant in error.

JONES, E. H., J. In the action below the defendant William F. Weber was plaintiff, and in his petition sought damages on account of personal injuries alleged to have been sustained by him on the afternoon of October 23, 1910.

In his petition it is alleged that on said day "one of defendant's North Norwood cars being operated over Montgomery pike, inwardly bound for the said city of Cincinnati, stopped on the bridge which crosses the tracks of the Baltimore & Ohio Southwestern Railroad, in said city of Norwood, which said point is a regular stopping place, for the purpose of taking on passengers to be conveyed to Cincinnati.

"That while said car was standing still, after having stopped as aforesaid, this plaintiff started to board the same, and took hold of the rear post with his left hand and put his right foot on the step of said car, and was attempting to board the same for the purpose of being conveyed to Cincinnati, when said car, through the negligence and

carelessness of the agents and servants of said defendant, and before this plaintiff had ample opportunity to board the same and reach a place of safety, suddenly and without any notice or warning to this plaintiff, started with a violent and unusual jerk or motion, whereby this plaintiff, without any fault or negligence on his part, but solely through the negligence of said defendant, was violently thrown to the street," etc.

The trial resulted in a verdict in favor of the plaintiff below, and this proceeding in error is prosecuted for the purpose of reversing the judgment in his favor entered upon said verdict.

Two assignments of error are relied upon by plaintiff in error in the brief and oral argument of counsel.

The first error assigned is in the charge of the court. The plaintiff in error in its brief says:

"We submit that there is error in the charge of the court to the jury with reference to whether or not the plaintiff at the time the accident occurred, was a passenger, and, as such, entitled to demand from the defendant that it exercise toward him the highest degree of care as defined by the court below in his charge to the jury."

The brief then quotes the following portion of said charge:

"Now, coming down to this particular case, if the plaintiff was in the act of getting on the car, taking hold of the car, and was in the act of getting upon the car, he was then entitled to the rights of a passenger and the obligations existing between the company and the plaintiff are those to which I have already referred: ordinary care on the part

of the passenger to take care of himself and avoid dangers, and the highest degree of care on the part of the defendant, if, as I say you find from the evidence that the plaintiff had become a passenger. In other words, that he had laid hands upon the car, and had endeavored to get upon it. Also it must be before the car was in motion."

Counsel for plaintiff in error point out that this portion of the charge was erroneous in that the trial judge did not incorporate in it something to the following effect:

"And if the jury should find that the conductor knew, or by the exercise of ordinary care should have known, that the plaintiff was about to board the car while it was at a standstill."

It is admitted in the answer of the defendant below that the place where the accident occurred was a regular stopping place for taking on and letting off passengers. There is no question, from the evidence, but that the car stopped for the purpose of taking on a group of persons who were waiting for the car. It is also uncontradicted that the plaintiff below was among those who were waiting to board the car. These facts having been proven, and there being no evidence tending to rebut the same, it is unnecessary, in the opinion of the court, for the trial court to incorporate in its charge any condition with reference thereto such as that quoted above from the brief of counsel for plaintiff in error. The motorman and conductor both testified that the car stopped at this regular stopping place for the purpose of taking on these would-be passengers, thus extending to them an invitation which was accepted by several persons as

soon as they respectively laid hold upon the car for the purpose of entering the same.

This principle of law seems to be well established, and is concisely stated in 1 *Nellis on Street Railways* (2 ed.), Section 252, as follows:

"One is a passenger in a street car who is in the act of stepping on the step or platform, the car having stopped for him, and in case of an accident when stepping on, his rights are those of a passenger."

Under the undisputed facts as stated above, we conclude that the charge of the court, or the portion thereof above quoted, contains a complete statement of the law as applicable to this case.

The second and last assignment of error complained of is stated in the brief for plaintiff in error as follows:

"We submit that the court below also erred in submitting to the jury, by reading the petition, elements of damage claimed in the petition which were not supported by any evidence. We refer to the following portion of the petition as included in the charge: 'That he was unable to attend to his grocery business but has had to employ extra help in order to carry on the same, during which time, because of the lack of his personal attention, he has lost several customers and has otherwise sustained losses in said business.'"

The bill of exceptions shows that the court read to the jury the entire petition, including the language just quoted. It is conceded that there was no evidence to support in any way this allegation in the petition. It is not claimed that the court in the portion of the charge which followed the read-

ing of the pleadings made any allusion to this element of damage which was unsupported by evidence; on the contrary, the court mentioned the different elements of damage which would go to make up the verdict of the jury in case they should find in favor of the plaintiff, and nowhere did it make any mention of the loss of business complained of in the petition. It would be a sad reflection on the intelligence of the twelve men who made up the jury to assume, in the face of the charge of the court upon the elements which constituted the damage and upon the necessity of proof to support each of the claims, that they would proceed to award damages upon a claim in the petition which was abandoned by the plaintiff in the trial of the case and which had no evidence whatever in its support.

After a careful examination of the record, and a consideration of the points advanced by counsel for plaintiff in error, we are persuaded that there is no error in any manner prejudicial to the plaintiff in error; that substantial justice has been done; and that the judgment below should be affirmed.

Judgment affirmed.

JONES, OLIVER B., and SWING, JJ., concur.

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Bettman et al. v. Sporkin et al.

BETTMAN ET AL. v. SPORKIN ET AL.

*Accord and satisfaction—Controversy over unliquidated claim—
Tender of check in full settlement—Effect of retaining and
using such check.*

When there is a *bona fide* controversy existing between two parties regarding the amount due on an unliquidated claim, and the debtor sends to the creditor a check, upon which appear the words, "In settlement of account in full," and the creditor receives this check and retains the same and uses it, there is an accord and satisfaction and the creditor cannot recover any additional amount on account of such claim.

(Decided March 22, 1915.)

ERROR: Court of Appeals for Hamilton county.

Mr. Joseph W. O'Hara, for plaintiffs in error.

Messrs. Matthews & Matthews, for defendants in error.

ORMAN, J. The action below was brought by Sporkin Brothers & Company, defendants in error in this case, to recover from the plaintiffs in error, Bettman, Cohen & Company, a balance amounting to \$931.56, claimed to be due on an account.

The original account was for goods sold and delivered by the defendants in error to the plaintiffs in error, and amounted to something like \$17,000, all of which had been paid except the balance claimed. There was attached to the petition an itemized account.

The answer of the defendants was a general denial, after admitting the respective partnerships of plaintiffs and defendants; and by way of second

defense set up full settlement of the account by accord and satisfaction, in this, to-wit, that on October 24, 1910, a check was sent to the plaintiffs for \$1553.31, and endorsed thereon, on the body of the check, were the words, "In settlement of account in full;" that this check was sent in a letter which contained an itemized statement of a corrected account of the transactions between the plaintiffs and the defendants.

Upon the trial of the case below a verdict was rendered in favor of the plaintiffs for \$516.76, which sum included interest from the time claimed up to the first day of the term. Deducting the interest, the verdict represents \$472.10, and this sum represents the aggregate of two items of invoices claimed to have been sold and delivered by the plaintiffs to the defendants: one, July 15, 1910, \$254.75, and the other, August 20, 1910, for \$217.35.

The evidence in this case adduced at the trial shows that some time prior to September 26, 1910, a dispute and controversy arose between plaintiffs and defendants concerning the quality of the goods sent by the plaintiffs to the defendants, the amount of discount which should be allowed, and the question of the receipt of some goods, and other matters. On that day, September 26, 1910, a member of the plaintiff firm came from Philadelphia to Cincinnati and had a conference with Mr. Bettman of the defendant firm, after which it was agreed between the parties, and the agreement reduced to writing, that of the 625 suits of clothes held by Bettman, Cohen & Company, and shipped by the plaintiffs, 325 suits were to be taken back

by the plaintiffs and credit given by the plaintiffs to Bettman, Cohen & Company for them; and it was further agreed that Bettman, Cohen & Company would pay the rest of the account at once after the return of the goods, deducting $4\frac{1}{2}$ per cent. discount upon the whole account, instead of payment upon the original terms. The goods were sent back, 325 suits, and on that day \$2,000 was paid to the plaintiffs, and, later, \$2,000 more was sent to the plaintiffs. The defendants wrote to the plaintiffs to send an account, but no account was sent; and the evidence does not disclose that up to this time any account had ever been rendered by the plaintiffs for goods sold up to the 26th day of September, 1910.

The defendants not having received an account, finally, on October 17, 1910, sent a letter to the plaintiffs in which they "again request a complete statement so that we can mail you check." On October 8th the defendants had written to plaintiffs remitting the \$2,000 and asking them to send a correct and complete statement of the account, crediting the goods returned, and stating that upon receipt thereof the defendants would mail check. (See Exhibit 3.) On the 20th of October the plaintiffs sent what purported to be a complete itemized account of charges and credits, showing a balance due from the defendants to the plaintiffs of \$3,116.35. Thereupon Mr. Bettman of the defendant company sat down and prepared a contra account, item by item, in which he omitted from the account sent by the plaintiffs, four items: One of July 15, 1910, for \$254.75; one of August 20, 1910, for \$217.35; and two items of

September 17, 1910, one for \$659.25 and the other for \$63.35. Mr. Bettman also in the contra account made deductions for basting, and a great many other items, and marked the deductions upon the itemized account which he made out. There were a great number of these deductions made in addition to the deduction of the four items. He also marked on the bill the credits — cash paid and goods returned; and took credit for $4\frac{1}{2}$ per cent. discount, as he claimed was agreed upon on September 26th. In the letter of the plaintiffs to the defendants containing their account sent October 20, they did not allow $4\frac{1}{2}$ per cent. discount, and claimed that inasmuch as the defendants had not paid promptly, as they said they would, that the $4\frac{1}{2}$ per cent. discount agreed upon on September 26th should not be allowed. Upon October 22, after Bettman had made out his contra account with all the deductions, which showed a balance of \$1553.31, he enclosed a check with the account, and also a letter to the plaintiffs. The check was payable to the plaintiffs, and in the body thereof contained a statement, "in settlement of the account in full." The letter was dated October 22. The contra account was dated October 22, but the check was dated October 24, and that is the day the check, the account and the letter were sent — Sunday having intervened between the 22d and 24th. In this letter the defendants said:

"Replying to your favor of the 20th instant, we beg to state that when you left here you said that when you received the goods we shipped back to you, you would send us a statement, but you did

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not do it. We had to write you for the statement. We therefore distinctly hold you to the agreement in regard to the discount and enclose herein a check in settlement of account.

“BETTMAN, COHEN & Co.”

The evidence discloses that the check, the letter and the contra account reached the plaintiffs, and there is evidence tending to show that at the time the check was received it contained the endorsement above referred to. Furthermore the jury, in answer to an interrogatory, found as a matter of fact that the check when received by the plaintiffs did contain the above endorsement, “in settlement of account in full,” so that it is established in this case that the check was received in that condition. The plaintiffs banked the check, and after it had gone through the clearing house and been collected they then made a further demand upon defendants for some \$1600. Subsequently they admitted that from the \$1600 the two items of September 17, aggregating \$722.60, should be deducted, because the defendants never received the goods charged.

Upon the trial of the case, upon the conclusion of all the evidence, counsel for the defendants requested the court to give the following special charge, which the court refused to give:

“If the jury should find that on October 24th, 1910, there was a controversy existing between the plaintiff and the defendant regarding the amount due from the defendant to the plaintiff, and that the defendant sent to the plaintiff a check, upon which appeared the words ‘In settlement of account in full’ and that the plaintiff received this check and

retained the same and used it, then I charge you that there was an accord and satisfaction in this case, and the plaintiff cannot recover, and the defendant is entitled to a verdict."

We are of the opinion that under the evidence in the case it was shown that there was a controversy between these parties on the 24th of October, 1910, when the check was received, and prior to that time. The question of discounts was in dispute, the question of the four items was in dispute, the question of the charge made for bastings, etc., was in dispute, and when the account was sent by the plaintiffs setting out all these charges and items and was received in Cincinnati by the defendants, and the defendants took up that account and made out what they claimed to be a corrected account and forwarded that to the plaintiffs with a check for the balance shown, with the words quoted above endorsed thereon, and that account with the letter and the check went to the plaintiffs, they were chargeable with notice of the fact that the defendants disputed the correctness of their itemized account sent on October 20; so that when the plaintiffs took the check they took it with full knowledge that the defendants were disputing the correctness of their account and were tendering the check in full payment and satisfaction of the account. We are therefore of the opinion that the court erred in refusing to give this special charge.

We think that there was error in the general charge of the court in this, to-wit, that the court (Record, page 74) used the following language in his charge:

"If you find by a preponderance of the evidence that it did contain these words 'in full settlement of account in full' when it was received by the plaintiffs in Philadelphia, then you will go further and consider whether it was in payment in full of the account enclosed by the defendants with the check, or whether it included in payment in full of the entire account between these parties, and if you find that it was in payment on the account that was enclosed by the defendants to the plaintiffs, then the plaintiffs would be entitled to recover whatever balance of the account they had against the defendants, should you find that they are entitled to anything. Should you find it covered the whole account as presented between these parties, your verdict will be for the defendants, provided you find there is a *bona fide* dispute after September 26th and that these words were in the check when it was received by the plaintiffs. If you should find the check was only in payment in full of the account enclosed with the check, which was sent with the check by the defendants, then you will consider the other items not included in the account sued on by the defendants. These items, as the court remembers, are the shipments of July 15th and August 10th of two cases of goods. If you find they were not included in the check, then if they were ordered by the defendants from the plaintiffs and plaintiffs shipped them to the railroad company and they were received by the railroad company, they would be the property of the defendants and they would be liable for the amount and your verdict would be for the amount of the goods."

We think this charge had a tendency to mislead the jury into finding in favor of the plaintiffs on the items of July 15 and August 20, 1910.

The jury, upon a special interrogatory submitted to them, found against the plaintiffs and in favor of the defendants on the question of the endorsement on the check, and this being true, we are of the opinion that it was the duty of the court, after the return of the verdict, to have granted the motion of the defendants to enter a judgment in favor of the defendants, notwithstanding the verdict, and that the facts in the case were such that the defendants were entitled to a verdict.

We think the law-point in this case has been settled by our supreme court in the case of *The Seeds Grain & Hay Co. v. Conger*, 83 Ohio St., 169, the syllabus of which reads as follows:

"1. When there is a *bona fide* dispute over an unliquidated demand and the debtor tenders an amount less than the amount in dispute, upon the express condition that it shall be in full of the disputed claim, the creditor has but one alternative; he must accept the amount tendered upon the terms of the condition, unless the condition be waived, or he must reject it entirely, or if he has received the amount by check in a letter, he must return it.

"2. Where in such case the creditor retains a check which was sent upon the condition that it shall be in full satisfaction of the debt claimed to be due, and receives the money thereon and notifies the debtor that the amount is placed to his credit, but that he does not intend that the same shall close up the matter in dispute, to which the debtor makes no reply, such silence by the debtor does not amount

to a withdrawal of the condition which accompanied the tender, nor to a waiver of it. The transaction is an accord and satisfaction."

See also *Brown-Ketcham Iron Works v. Hazen et al.*, 4 C. C., N. S., 582. In this decision of the circuit court of this county the court held:

"The law in Ohio as to accord and satisfaction does not differ from that of other states or of the federal courts in that, where a liquidated sum is due, the acceptance of a draft for a less sum in satisfaction thereof is binding as in full satisfaction, notwithstanding a want of full satisfaction."

This rule of course applies to an unliquidated claim such as the one in the case at bar.

To the same effect are the cases of *C., M. & St. P. Ry. Co. v. Clark*, 178 U. S., 353, and *Ostrander v. Scott*, 161 Ill., 339.

Counsel for defendants in error, plaintiffs below, have cited several authorities to the effect that the dispute must exist before the tender of the payment is made in order to constitute the payment of a smaller sum an accord and satisfaction of the larger sum claimed. Even if this be true, the court is of the opinion that in the case at bar there was a controversy and dispute between plaintiffs and defendants in this case with reference to this account, and inasmuch as there was but one account, there was no room for difference as to what account was in dispute. It was the account which the plaintiffs had against the defendants. The defendants had no account against the plaintiffs, and the memorandum sent by the defendants through Mr. Bettman was simply a re-statement of the

plaintiffs' account as the defendants claimed it should be.

For the reasons stated herein we are of the opinion that the judgment of the court of common pleas should be reversed and this court should enter a judgment in favor of the defendants, as the court of common pleas should have done on the motion for judgment *non obstante veredicto*.

Judgment reversed, and judgment for plaintiffs in error.

JONES, E. H., P. J., and JONES, OLIVER B., concur.

THE REEVES BROTHERS CO. v. COCHLI.

Negligence—Evidence—Model of machine admissible, when—Charge to jury—Comparative negligence and apportionment of damages—Assumption of risk.

1. In an action by an employe on account of injuries received, it is competent to offer in evidence for illustrative purposes a model substantially representing the main parts of the machine in which he was injured.
2. The law is correctly given in an instruction to the jury as to comparative negligence which states that if they find from a preponderance of the evidence that the negligence of the plaintiff was slight and by a like preponderance of the evidence that the negligence of the defendant was gross, and all the disputed matters are found in favor of the plaintiff, the damages suffered by plaintiff, if any, will then be compared and apportioned between the plaintiff and defendant in the ratio of their respective contributions of negligence to the combined negligence, and plaintiff's recovery, if any, will be diminished in accordance with the ratio thus fixed and determined.
3. An instruction to the jury which declares as a matter of law that plaintiff assumes the risk of stumbling over or otherwise

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coming in contact with a necessary part of the machine which he is operating, renders nugatory the present statutory provision as to the negligence of the employer.

(Decided February 25, 1916.)

ERROR: Court of Appeals for Stark county.

Messrs. Welty & Burt, for plaintiff in error.

Messrs. Hart & Koehler, for defendant in error.

HOUCK, J. This proceeding in error is brought to reverse a judgment for \$2000 recovered by the defendant in error, John G. Cochli, for damages for personal injuries sustained by him on September 10, 1910, while in the employ of the plaintiff in error as a machinist in the machine shop of plaintiff in error.

For some time prior to September 10, 1910, the defendant in error had been employed as a machinist by The Reeves Brothers Company, of Alliance, Ohio. He had been directed by his foreman to work upon a large boring mill, and on said day was boring holes through a large engine base on this particular boring mill, which was a large machine over 15 feet in length and about 10 to 12 feet high, set on a concrete base, so that it could be worked horizontally or perpendicularly, and adjusted to do the work it was intended to do. On this machine there was a bracket of cast iron weighing about 75 pounds, extending from its base to the north about a foot, and from the floor about 6 to 8 inches, leaving a hollow space under the bracket. When operating this machine on the day in question something happened which loosened the cutting tool, by means of which the hole was being

bored, and Cochli, while hurrying to get to the lock wheel, caught his foot on the inside of his leg under this bracket, injuring his left leg, which he claims resulted in necrosis of the bone.

Plaintiff below alleged in his petition that the defendant below was guilty of carelessness and negligence in the following particulars:

First. In not providing him a safe place within which to work, taking into consideration the necessary operation of said machine, and in locating said controller so that plaintiff was compelled to pass over said bracket on the north side of said machine on and along the necessary path of travel of the operator of said machine in going quickly, as necessity required, from the face plate or table on one end of the same to the feed nut on the spindle of the other end thereof.

Second. In leaving said bracket extended from 6 to 8 inches from the floor, and leaving the same extended about one foot from the base upon which said machine was located.

Third. In permitting plaintiff to work on said boring mill equipped with a controller placed in such position as to compel the plaintiff in the operation of said machine to move over and across said bracket hereinbefore described, and in leaving said bracket unguarded and so placed that the operator in charge of said boring mill was liable to be injured.

Fourth. In failing to exercise proper care under the circumstances, taking into consideration the location and equipment of said boring mill and the necessary operation of the same for the safety of plaintiff.

The defendant below by answer denied that it was guilty of any negligence which contributed to or caused the alleged injuries to plaintiff; asserting that the bracket complained of is a part of the framework of the machine and used to support the machine; that said bracket is not in itself in any way dangerous or complicated and requires no care or protection; that it was not necessary to go over or across said bracket in the proper operation of said machine; that said bracket, and said controller, and the entire situation about said machine, was open and visible and known to plaintiff; that if there was any danger in the operation of said machine (which they denied) the plaintiff realized, or in the exercise of ordinary care could have realized the same; and that whatever injuries plaintiff received, if any, were caused by his own negligence and were not the fault or negligence of the defendant.

The errors relied upon in oral argument by counsel for plaintiff in error are:

First. That the court erred in overruling the demurrer to the amended petition.

Second. That the court erred in admitting plaintiff's model (Exhibit C) in evidence.

Third. That the court erred in its general charge as to the subject of comparative negligence.

Fourth. Error in the refusal of the court to give request number four, which was presented in writing before argument.

Fifth. That the verdict is against the weight of the evidence.

Coming now to the alleged errors, Should the demurrer to the amended petition have been sus-

tained? We think not. From a careful examination of the allegations and statements of fact contained therein we feel that the petition is sufficient in law, and that the charge of negligence on the part of the defendant is specific and definite, and that it fully comes within the provisions of Section 6245, General Code.

Was the plaintiff's model improperly admitted in evidence? On page 17 of the record appears the following in the testimony of the plaintiff:

"Q. Mr. Cochli I hand you now here what I ask the stenographer to identify as Plaintiff's Exhibit C, and ask you to state whether or not this substantially represents the main parts of the boring mill, its location on the base on which it stands, and the upright column of which you speak; the platform of the machine, the face plate, the lock nut and the controller, in their relative positions as they are on the machine in the shop? (Objection by defendant; objection overruled; exception by defendant.) A. Yes sir."

It will be seen from the above testimony that it is not claimed that the model is an exact duplicate of the original, or that it is drawn to actual scale, but that it only substantially represents the main parts of the machine, and was offered only for illustrating purposes, which we think was proper and right, and that the court did not err in admitting it in evidence for that purpose.

Did the trial court err in its general charge on the subject of comparative negligence? An examination of the language used by the trial court in discussing this subject might as a first impression lead a reviewing court to believe that it was not

properly presented to the jury, but taking all parts of the charge upon this subject into consideration we are of the opinion that the charge is correct and properly states the law relating to comparative negligence. Whatever seeming failure to properly charge in this regard there may have been is certainly cured by the trial court in the general charge, as appears on page 363 of the record, where the court instructed the jury as follows:

"If both the plaintiff and defendant were negligent, and their combined negligence operating together directly and proximately caused some injury to plaintiff, the plaintiff might still recover notwithstanding his contributory negligence, if you find from the evidence and by a preponderance of it that his negligence was slight, and at the same time find by a like preponderance that the negligence of the defendant was gross. In such case, if you find upon all the disputed matters in favor of the plaintiff, you will then compare and apportion the damage suffered by plaintiff, if you find he suffered any, between the plaintiff and defendant, in the ratio of their respective contributions of negligence, and the combined negligence thus diminishing plaintiff's recovery, if any, in accordance with the ratio previously found and fixed by you. In such case the remainder of the damage thus ascertained will be the amount of plaintiff's recovery, provided he recover at all, on the whole case."

As we have already said, if we take the entire charge upon this subject into consideration we are of the opinion that it was a fair and proper exposition of the law as to comparative negligence.

Did the trial court err in its refusal to give written request No. 4 before argument? The same is as follows:

"If you find from the evidence that the bracket in question herein was a proper and ordinary part of the boring mill upon which plaintiff was working at the time complained of, then I will say to you as a matter of law, inasmuch as plaintiff admits in his petition herein that he knew it was necessary for him in the operation of said machine to pass over said bracket, that he assumed the risk of stumbling over or otherwise coming in contact with said bracket, and that he can not recover damages against the defendant company for any injuries he may have received in so stumbling over or otherwise coming in contact with said bracket."

We do not think it necessary to discuss at length this proposition of law, but will only say if the court had given to the jury the above proposition of law it would have rendered nugatory the provisions of Section 6245, General Code, and therefore the court properly refused to so charge the jury.

Was the verdict of the jury against the manifest weight of the evidence? We have read the testimony as contained in the bill of exceptions for the purpose of ascertaining whether or not the verdict of the jury is supported by the evidence, and while we find some conflict in the testimony, we are by no means prepared to say that the verdict was against the manifest weight of the evidence, and therefore the judgment below will not be disturbed on that ground.

We do not think the other alleged errors prejudicial to the rights of plaintiff in error, and find-

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ing no error in the record prejudicial to the rights of plaintiff in error the judgment of the court of common pleas should be affirmed.

Judgment affirmed.

SHIELDS and POWELL, JJ., concur.

BOARD OF TOWNSHIP TRUSTEES OF WILSON
TOWNSHIP v. GILBERT ET AL.

Township trustees—Township ditch—Petition for same—Request for tiling not necessary, when—Township trustee may file ditch petition, when.

1. It is unnecessary, when township trustees are proceeding under a petition containing an express prayer for the tiling of a ditch, that one or more of the parties interested should make a written request, at the hearing of the petition, that the tiling be done.
2. There is no inhibition against an owner of real estate filing or joining in a petition to township trustees for an improvement of a ditch merely because at the time he happens to be a member of the board of township trustees, and the proceedings for such improvement are not invalid where the record shows that such trustee took no part, as trustee, in the proceedings by the board of trustees in relation to the matter, and that all proceedings were conducted by the other members of the board who constituted a quorum and had power to act.

(Decided February 22, 1915.)

ERROR: Court of Appeals for Clinton county.

Mr. Joe T. Doan, prosecuting attorney; *Mr. P. B. Aldridge* and *Mr. James M. Morton*, for plaintiff in error.

Mr. W. I. Stewart and *Messrs. Hayes & Hayes*, for defendants in error.

JONES, E. H., J. A petition in error was filed in this court seeking a reversal of the judgment of the court of common pleas in setting aside the action of the township trustees of Wilson township in certain proceedings had before said trustees for the cleaning, altering and tiling of a certain ditch.

This ditch was originally constructed about the year 1903, and the petition filed with the township trustees, upon which the proceedings under review are based, prayed that "you may establish, deepen, straighten, alter the course of if necessary, and tile with proper underground drain tile that part of the township ditch known as the Aaron Gilbert Ditch petitioned for by Aaron Gilbert, and located and established by the trustees of said township about August, 1903, described as follows:" etc.

It was held by the common pleas court on petition in error that under such a petition the township trustees had no authority to order that said ditch or any part thereof be tiled, unless one or more of the parties interested should make a written request, at the hearing of the petition, that tiling be done, in accordance with the terms of Section 6614, General Code.

This section has application, as we think, to proceedings in the establishment and construction of a ditch where the petition does not contain an express prayer for tiling. The proceeding under review, however, was manifestly brought under Section 6644, General Code, which relates to altering, deepening, widening, enlarging, repairing, boxing or tiling a ditch already established and constructed, as was this Gilbert ditch:

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“Section 6644. The trustees may cause a ditch, or part thereof, located and constructed under any law, to be altered, deepened, widened, enlarged, repaired, boxed or tiled, and like proceedings shall be had, so far as applicable, as is required in the location and construction thereof. The expense thereof shall be apportioned as is provided in this title for original construction.”

The petition filed with the trustees, out of which this controversy arose, asks, among other things, that the ditch be tiled. The transcript of the proceedings before the township trustees shows, by written objections filed and claims of various kinds presented by those interested, that the tiling was an important part of the improvement under consideration.

It seems to us that it would be a vain thing in such a proceeding to require those desiring an enclosed ditch, or a tiled ditch, to renew this prayer, or to file any sort of a written request, when the original petition, as we have said, clearly embraced the tiling of the ditch.

Counsel for defendants in error lay stress in their brief upon the fact that Mr. Peele, petitioner for the improvement, was at the time the petition was filed and during the pendency of the proceedings, a member of the board of township trustees, and that by reason of his holding his said position he had no right to file the petition.

The statute provides that a majority of the board of township trustees may act in any matter, and we find no inhibition against an owner of real estate filing or joining in a petition for an improvement of a ditch merely because at that time he hap-

pens to hold the office of township trustee or other office. The record shows that he took no part, as trustee, in the proceedings by the board of trustees in relation to this matter, but that all proceedings were conducted by the other members of the board, who constituted a quorum and had power to act.

We find that there was error in the judgment of the common pleas court in reversing so much of the proceedings of the trustees as ordered the ditch to be tiled.

We have examined the other errors assigned in the petition in error filed in the common pleas court, and fail to see where there was any departure from the provisions of the statute in the action of the trustees.

Judgment reversed.

SWING, P. J., and JONES, OLIVER B., J., concur.

App.] Loan & Building Co. v. Concrete Co.

THE ELMWOOD PLACE LOAN & BUILDING CO. v.
THE CINCINNATI CONCRETE CO. ET AL.

Alimony—Lis pendens—Filing of petition—Allowance of restraining order—Judgment for alimony relates back, when.

When a petition for alimony is filed and a restraining order issued enjoining the defendant from disposing of or incumbering certain property described in the petition, the action in alimony becomes a *lis pendens* against the property described in the petition and covered by the injunction, from the date of the filing of such petition and the issue of such injunction, and a judgment thereafter taken in the suit for alimony relates back to the date when the petition was filed and the restraining order issued.

(Decided March 22, 1915.)

ERROR: Court of Appeals for Hamilton county.

Mr. W. W. Bellew, for Luella J. Brown.

Messrs. P. & S. C. Roettinger and *Mr. Harry B. Street*, for defendants in error.

JONES, OLIVER B., J. The question to be determined in this case is one of priority of liens upon a fund arising from the sale of certain real estate under foreclosure proceedings.

Luella J. Brown claims a lien by virtue of a decree for alimony. The petition under which said decree was taken was filed November 8, 1911, and a restraining order was issued on that date enjoining the defendant from disposing of or encumbering property, the description of which was set out in the petition, and which included a lot later sold in foreclosure, the proceeds of which are now sought to be reached. This injunction remained

against said property until the entry of the decree, which was made October 24, 1912, and which adjudged in addition to other property an allowance of the sum of \$900 in money, which was thereby made a lien on said real estate.

The Cincinnati Concrete Company claims a lien for \$299.89 by reason of a judgment taken against Jay Brown, the owner of said real estate, before Edward F. Woodruff, justice of the peace, a transcript of which judgment was filed in the court of common pleas May 4, 1912. The transcript shows that this judgment was taken before the magistrate March 12, 1912, upon the confession of the defendant. This confessed judgment was therefore a violation of the restraining order issued against said defendant in the alimony case. Outside of that question, however, the action in alimony became a *lis pendens* against the property described in the petition and covered by the injunction, from the date of the filing of said petition and the issue of such injunction, and the judgment when taken in that case related back to that date, November 8, 1911.

Luella J. Brown must therefore be held to have a prior lien on the proceeds of said property. *Tolerton et al., Exrs., v. Williard et al.*, 30 Ohio St., 579.

Judgment accordingly.

JONES, E. H., P. J., and GORMAN, J., concur.

HARLAN v. VEIDT.

Equity—Injunction—Landlord and tenant—Action to quiet title—Extension of term of lease—Notice to landlord, necessity of.

1. When a lease contains an option to the lessee to have the term of the lease extended, no notice of an election to have the term continued is necessary, unless it is required by the terms of the lease.
2. The jurisdiction of a court of equity cannot be invoked when the plaintiff has a plain, adequate remedy at law.
3. A tenant at sufferance has no term, but is in merely by the forbearance of the landlord to act.
4. Only one who is in possession of real estate may maintain an action to quiet title, unless the plaintiff claims as remainderman or reversioner.
5. The question of title cannot be raised in an injunction case, and is one to be determined in a court of law.

(Decided April 12, 1915.)

APPEAL: Court of Appeals for Butler county.

Mr. B. F. Harwitz and Mr. Allen Andrews, for plaintiff.

Mr. Edgar S. Belden and Mr. W. K. Rhonemus, for defendant.

ORMAN, J. This cause comes into this court on appeal from a judgment of the common pleas court.

The plaintiff, Mary A. Harlan, avers in her petition that she is the owner in fee simple of a certain described farm in Madison township; that defendant, Edward Veidt, entered upon said premises as the tenant of plaintiff's grantor; that said defendant's term of rental expired March 1, 1914, but

by sufferance of the parties he was permitted to remain in possession until March 1, 1915; that without plaintiff's knowledge or consent defendant has plowed certain fields in said farm and is about to and threatens to sow the same in rye, and claims to be entitled to retain possession of said premises after March 1, 1915; and that defendant claims to be entitled to other interests in said lands and to the possession thereof, all of which claims of possession and of right to enter upon and plow the fields of said lands after March 1, 1915, are a cloud on plaintiff's title. The prayer of the petition is that defendant be enjoined from plowing any of the fields and from sowing the same in crops; that defendant be required to show his title to said real estate; that the court adjudge his claims to be null and void and a cloud on plaintiff's title; that plaintiff's title be quieted as against the defendant's claims; that he be perpetually enjoined from entering upon any portion of said premises and perpetually enjoined from setting up any claim or title adverse to plaintiff's title to said premises; and for all other relief.

In his answer defendant admits plaintiff's title in fee simple; admits that he is about to plow and threatens to plow and sow as alleged in the petition; admits that he claims to be entitled to retain possession of the premises after March 1, 1915; and denies each and every other allegation of the petition. Defendant further sets up that he entered into the possession of said premises on March 1, 1911, under a lease for three years from S. Jennie Sorg, who is plaintiff's grantor and was the owner in fee simple of said premises, and attaches

to and makes a part of his answer a copy of said lease; that the term of said lease expired March 1, 1914; that it contained a privilege or option on his part of two additional years on the expiration of the lease; and avers that he is in possession under said lease and entitled to hold, keep and control the same until March 1, 1916, by virtue of the terms of said lease. He denies that his possession during 1914 was by sufferance, and avers that he has kept and observed all the covenants and stipulations of said lease on his part to be performed; and he prays that plaintiff's petition be dismissed.

The reply denies that defendant exercised his option or privilege of two additional years, avers that he failed to exercise his privilege for two additional years, and pleads that defendant is estopped to claim his right of occupancy and possession for said additional term of two years.

The copy of the lease, and the original lease, which were offered in evidence, contain these provisions as to the term of the lease:

"For and during the full term of three years next ensuing, commencing on the first day of March, 1911, and to be fully completed and ended on the 28th day of February, 1914; with the privilege of two additional years at the expiration of this lease."

And it contains the following covenant as to the rent for the additional term of two years:

"It is further agreed by and between the parties that said lessee shall have the right, privilege and option of an additional term of two years from and after the expiration of the term hereby created; upon the condition, however, that the rent for any

additional term after the expiration of the three years herein granted, shall be the sum of \$800 for each and every year; the rent to be payable in advance as hereinbefore stated."

It appeared in evidence that defendant entered into possession under said lease and has remained in continuous and uninterrupted possession ever since; that on March 2, 1914, S. Jennie Sorg conveyed by warranty deed to plaintiff said premises, which deed was recorded March 3, 1914. In said deed was the following stipulation with reference to defendant's lease: "And further subject to a lease on said premises granted by S. Jennie Sorg to Edward Veidt, to which lease reference is hereby made." Plaintiff therefore bought said premises with full knowledge of and subject to said lease which was in writing and duly witnessed and acknowledged.

The transcript of the evidence on which the case is here submitted discloses that the lease and deed were offered in evidence; that plaintiff had a contract to purchase the premises, made in October, 1913, but not closed up until March 2d or 3d, 1914; and that some time in the early part of December, 1913, Dr. Harlan, the husband and agent of plaintiff, met Veidt, the defendant, in Middletown and had a conversation with him about the farm. He told Veidt that he had bought the farm. Veidt complained of the high rent and the need of repairs, and said that he did not intend to pay that \$800 "until a h—— of a lot of fixing was done." Veidt said nothing about leaving the farm or surrendering it at the expiration of the term, March 1, 1914. That was the only conversation between

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Veidt and Dr. Harlan until March 5th or 6th, 1914, on which date Mr. Walburg, the agent for Mrs. Sorg, and Dr. Harlan, called on Veidt, who was still in possession of the farm, and talked to him about the payment of the \$800 rent for 1914. Veidt did not pay them the rent, but complained a great deal about the need of repairs and the high rent. Walburg asked Veidt if he intended to avail himself of his option under the lease, and Walburg said: "If you do, I am here to collect the rent, which is now past due." Veidt, according to Dr. Harlan, made no positive answer as to whether he would exercise his option or not. Mr. Walburg testified that, when asked if he wanted to exercise his option under the lease (for two years), Veidt said he did not know whether he would or not; and then complained of the high rent and the lack of repairs. Veidt did not then pay the \$800 rent although several times asked to do so by Walburg. Veidt continued to remain on the farm, and on June 12, 1914, he paid Walburg, agent for Mrs. Sorg, \$800, the rent for 1914, and stated in a note left for Walburg that he would be ready with the \$800 rent on March 1, 1915, for the second year. Walburg saw plaintiff and her husband Dr. Harlan, and they kept the \$800, and Walburg then wrote a note to Veidt on June 15, (Exhibit 4), in which he states that he has gotten Dr. Harlan's consent to accept the check for \$800, and that Dr. Harlan has consented not to disturb Veidt during the growing season of 1914. Up to the time of paying the \$800 rent, June 12, 1914, Veidt did not inform Walburg or Dr. Harlan that he intended to remain the two years longer provided for in the

lease; but he remained on the farm after March 1, 1914, and it is in evidence that he denied ever intimating that he intended to surrender the farm before March 1, 1916.

Without undertaking to review the evidence fully, it appears to be sufficiently disclosed that Veidt did not vacate or surrender before March 1, 1914; that he never said he would do so; and that he continued in possession after March 1, 1914, in pursuance of his right or privilege for two additional years, according to his statement. He was in under the lease, and in our opinion the mere holding over after March 1, 1914, was an exercise of his option or privilege to remain for the two additional years. It was not necessary for him to indicate, otherwise than by continuing in possession, after March 1, 1914, that he made his election to remain for the additional term of two years. The holding over without any new agreement was an election on his part, and he was bound for the two years and liable to plaintiff for the two years' rent at \$800 per year as stipulated in the lease. We consider this provision in the lease as an agreement for an *extension* of the lease and not for a renewal. If it had been a provision for a renewal, then notice on Veidt's part would be necessary in order to entitle him to *remain longer*. (Jones on Landlord and Tenant, Section 339.) But there is a distinction made in the cases between a renewal of a lease and an extension, and in the case of the lease before us, no notice is required to entitle the tenant to the additional term. Merely holding over under the lease constitutes an election to exercise the privilege or option. Jones on Landlord and

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Tenant, Section 337; *Fleischner v. Citizens' Inv. Co.*, 25 Or., 119, and *Harding v. Seeley*, 148 Pa. St., 20.

When there is an option to the lessee to have the same term extended, no notice of an election to have the term continue is necessary, unless it is required by a clause in a lease. Jones on Landlord and Tenant, Section 340; *Terstegge v. First German, etc., Society*, 92 Ind., 82; *Montgomery v. Board of Commissioners*, 76 Ind., 362; *Mershon v. Williams*, 62 N. J. L., 779; *Chandler v. McGinney*, 8 Kans. App., 421, and 18 Am. & Eng. Ency. of Law (2 ed.), 693.

The case cited by counsel for plaintiff, *Keppler Bros. v. Heinrichsdorf*, 5 C. C., N. S., 112, which holds that notice was necessary, was a case in which the lease stipulated for a notice to be given by the tenant of his intention to accept or decline, six months before the termination of the lease.

We are therefore of the opinion that the defendant, being liable for the two years additional rent under the extension of the lease, was entitled to remain on the farm and plow and sow, and the petition of plaintiff should be dismissed.

But whether this conclusion be sound or otherwise, we are further of the opinion that the plaintiff is not entitled to invoke the jurisdiction of a court of equity, as she has done in this case, when she has a plain, adequate remedy at law. Possession of this farm after March 1, 1915, is what the plaintiff sought. The plowing of the fields was not in the nature of waste, nor is it claimed that any substantial injury was being done to the freehold so as to entitle plaintiff to an injunction to

prevent the commission of waste. Plaintiff could have brought an action in forcible entry and detainer, if, as she averred, the defendant was a tenant at sufferance, because if this claim were true then defendant was holding over his term and not a tenant at all, and forcible entry would lie. There would be no question of title involved, as a tenant holding over would not be permitted to question his landlord's title. A tenant at sufferance has no term, but is in merely by the forbearance of the landlord to act, his omission to take action to evict the tenant. A tenancy by sufferance is not a tenancy at all. It is a mere holding by laches of the owner. Jones on Landlord and Tenant, Section 220-221.

But it is averred that the defendant claims some title adverse to plaintiff's title and is in possession. The evidence does not disclose this to be true, but, if it were true, then the plaintiff's remedy would be an action at law in ejectment to recover the lands, under Section 11903, General Code, in which action all questions of plaintiff's and defendant's titles, legal or equitable, could be raised.

Nor can it be claimed that plaintiff can maintain this action as one in equity to quiet title, because she is not in possession of the lands, and it is only those who are in possession of the real estate who may maintain an action to quiet title, unless the plaintiff claims as remainderman or reversioner, which plaintiff in this action does not aver. See Section 11901, General Code; *Ellithorpe v. Buck et al.*, 17 Ohio St., 72, 75, and *Bailey v. Hughes*, 35 Ohio St., 597.

Nor can the question of title be raised in an in-

junction proceeding. The question of title is one to be determined exclusively in a court of law.

"A bill to establish a legal title and to restrain proceedings at law will not be entertained, no equitable circumstances appearing in the case and nothing that prevents a full defense at law." 1 High on Injunctions (4 ed.), Section 101, and *DeGroot et al. v. Receivers*, 2 Green Ch., 198.

Injunctions in cases affecting the possession of real estate would not be countenanced by the court of equity; and this has been the rule from the earliest times. 1 High on Injunctions (4 ed.), Section 344, and *Lady Poines's Case*, 1 Vern., 156.

If one is in possession without legal title, the remedy is at law and not by injunction. 1 High on Injunctions (4 ed.), Sections 359, 360; *Pfeltz et al. v. Pfeltz et al.*, 14 Md., 376, and *Toledo Exposition Co. v. Kerr et al.*, 8 C. C., N. S., 369.

The averments of the petition in the case at bar, as in the case we next cite, disclose an action for the recovery of real property, ejectment, and the facts set out in the case cited are so similar to the averments of the petition in the case at bar that we might well decide this case on that authority. *Raymond v. T., St. L. & K. C. Ry. Co.*, 57 Ohio St., 271, proposition 4 of the syllabus.

On the ground that plaintiff is not entitled to a decree under the facts of the case, and because this court as a court of equity has no jurisdiction, this being a case at law, the plaintiff's petition must be dismissed at her costs.

Petition dismissed.

JONES, OLIVER B., J., concurs.

JONES, E. H., P. J., dissenting. I cannot agree with my associates as to the nature of this action as disclosed by the pleadings, nor upon the conclusions to be drawn from the evidence as to the right of possession since March 1st, last.

Plaintiff alleges that defendant is plowing the fields and sowing rye, and her first prayer is that he be enjoined from so doing, for the reason that his right of possession will terminate on March 1, 1915, and that he is planting a crop that will not mature by that time. This prayer is further predicated upon allegations the substance of which is that such conduct on the part of defendant is equivalent to a threat to interfere with or totally deprive plaintiff of her possession after March 1, 1915, when, she avers, such right will accrue to her.

At the time plaintiff began this action below, she had no right of possession and claimed none. So that the 4th paragraph of the syllabus in *Raymond v. T., St. L. & K. C. Ry. Co.*, 57 Ohio St., 271, so strongly relied upon in the foregoing opinion, has no application to this case. There the plaintiff had the right to possession, as stated in the syllabus. Basing its judgment on that fact, the court there held that plaintiff had a remedy at law. What remedy at law had this plaintiff when her action was commenced? None whatever.

If defendant had the right to plow one or two fields in November and plant rye, he had an equal right to continue plowing throughout the winter, until the whole farm was plowed. He had received written notice in July to vacate on March 1st and apparently acquiesced. No plowing was done, nor fall planting done, until long after the usual time,

and it seems clear to me that his purpose in acting at such late date was to challenge plaintiff to interfere and to advise her of his determination to remain on the farm after March 1st when she claimed the right of entry.

As to the respective rights of the parties at this time I am also at variance with my colleagues. The law upon the subject of the extension and renewal of leases is fairly well settled, but we differ in our application of the law to the facts in this case. I cannot enter into a discussion of the evidence. Suffice it to say that the testimony of Dr. Harlan, detailing the conversation in December 1914 with Veidt, is not disputed and stands as an uncontradicted fact on this record. Veidt's positive statement cannot be taken but as a notice that he would leave the farm on March 1st. This, in view of his failure to retract what he said, and the failure of plaintiff to make any repairs prior to March 1st, terminated Veidt's tenancy on that date. Then he refused, upon demand, to pay the rent and only paid it immediately after a quarrel with Dr. Harlan in the following June. It makes no difference what the law may be as to mere holding over in the absence of declarations. Such is not this case. It was the proper and natural thing for the new owner to inquire of Veidt what his future intention was with respect to the farm, and Veidt is bound by his unretracted, deliberate answer, followed on March 5th by a similar declaration and his refusal to pay the rent then due under the terms of the lease upon which he now relies.

In discussing the subject, Jones, in his work on *Landlord and Tenant*, Section 341, says:

"Yet the tenant's announcement of his intention not to accept the extension would override the presumption arising from his continuance in possession." See, also, *Barnett v. Feary*, 101 Ind., 95.

The reference in the lease to the deed to Mrs. Harlan certainly gave Veidt no greater rights than he then had. Nor did the payment of the rent in June, 1914, for that year to Mr. Walburg, or anything written or said by Veidt at the time to Walburg, have any effect upon the status of Mrs. Harlan. Witness the letter by Walburg to Veidt, of June 15th.

I am of opinion that plaintiff was entitled to an injunction when the action was brought and that right is not impaired by reason of the fact that she asked other relief to which she was not entitled.

This question is so coupled with the other that it is unnecessary to say that I am also of the opinion that defendant's right to occupy the farm ended on March 1, 1915.

DUNCAN, RECEIVER, v. KIGER.

Bills of exceptions—Exhibits—Moving picture film—Reproduction to reviewing court—Petition for new trial after term—Newly discovered evidence.

1. When a bill of exceptions contains the film of a moving picture which was reproduced in the trial court, a reviewing court has power to order a reproduction of the same before it, by a competent expert, this course being a method of unfolding the exhibit so as to make it visible to the reviewing court.
2. It is not error to refuse to grant a petition for a new trial, filed after the term at which the verdict was rendered, based on the claim that the plaintiff in a personal injury case concealed an X-ray plate giving a view of his injured ankle, where such plaintiff denies ever having had possession of the plate, which was made under the direction of a surgeon employed by the defendant, and there is no evidence to show what the missing plate, if produced, would disclose as to the condition of plaintiff's ankle.

(Decided February 28, 1916.)

ERROR: Court of Appeals for Lucas county.

Mr. C. A. Seiders, for plaintiff in error.

Mr. C. A. Thatcher and *Mr. G. B. Keppel*, for defendant in error.

RICHARDS, J. This is a proceeding in error to reverse a judgment of the court of common pleas, refusing to grant a petition for a new trial filed in that court after the term at which the original judgment was rendered. In the original case a verdict and judgment were rendered in favor of Thomas N. Kiger, the plaintiff, in the sum of \$17,000, by reason of personal injuries received by him, and that judgment was affirmed in this court, upon

the plaintiff consenting to a remittitur of such a sum as reduced the judgment to \$9,000.

The petition for a new trial was filed under authority of Section 11580, General Code, on the claim that the defendant could not, with reasonable diligence, have discovered until after the trial term the evidence which has since come to his knowledge. The grounds for new trial are succinctly stated in the brief of counsel for plaintiff in error, and are, as there set forth, three prime matters, namely: the conduct and posturing of Kiger in the presence of the jury, whereby he sought to give a certain impression as to the condition of his injured foot, and upon which posturing certain witnesses based their evidence; his suppression of knowledge as to where a certain X-ray plate was and as to why it was not produced by the receiver; and his evidence relating to a certain pair of shoes worn by him as switchman. The receiver also claims to have discovered since the trial, by the aid of certain detectives, evidence that Kiger used his foot in such a way as to show a practically normal condition, and that he, Kiger, had possession of the missing X-ray plate before the original trial. A large mass of evidence was taken in the common pleas court on the hearing of this petition for a new trial, all of which evidence, together with much of the evidence used on the first trial, has been embodied in a bill of exceptions filed in this court.

One of the items of evidence introduced in the trial court by the receiver was the film of a moving picture, and in that court these pictures were reproduced before the trial judge. Against the objection of counsel for Kiger, this court on the hear-

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ing of the case ordered the reproduction, by a competent expert, of these moving pictures in the presence of this court, the record showing the speed at which they were reproduced in the trial court, and the same speed being used in this court.

We have no doubt of the power of a court in reviewing a case on error, involving this class of evidence, to order such reproduction, as it is no more than a method of unfolding an exhibit so as to make it visible to the court and place the reviewing court in possession of all the evidence which was used in the trial court. These moving pictures show Kiger walking along the street, with the aid of a crutch and cane, and it is contended that they show that he was able to, and did, place his left foot flat upon the sidewalk, which, if true, contradicts his testimony at the trial that he was unable to do so. In the judgment of this court, the moving pictures do not distinctly show how he used his foot in walking, and it is not distinctly apparent from these pictures that he did place his left foot flat upon the surface of the pavement.

Much evidence was introduced relating to the existence of an X-ray plate showing a view of the left foot or ankle of Kiger. The evidence discloses that the receiver was not guilty of any want of due diligence in failing to discover the facts with reference to this X-ray plate, before the first trial, but the serious fact remains that it does not appear that the condition of the foot or ankle disclosed by this plate would be material on a retrial of the case. In fact, there is no evidence to disclose what the missing plate would show as to the condition. Neither does the evidence disclose that any unfair

advantage was taken of defendant in the trial court on the first trial, by reason of the failure to produce this missing plate. It is insisted by counsel for the receiver, however, that such improper argument was used on the hearing of the original case in the court of appeals, and it is contended that this fact is made to appear by introducing in evidence, on the hearing of the petition for new trial, a portion of the brief which was filed by counsel for Kiger and used by the court of appeals in the original case. Kiger, however, denies that he ever had possession of the missing plate, and his counsel may well have believed the position thus taken by Kiger, and, so believing, did not overstep the bounds of proper argument in commenting on the failure of the receiver to produce the missing plate, that plate having been made under the direction of a surgeon acting for the receiver of the company. Even if we should assume that unfair argument had been used in the court of appeals with reference to the missing plate, that would not justify the common pleas court in granting the petition for a new trial.

Much of the evidence relates to two pairs of shoes, one of which was found by detectives, after the trial, in the cellar or basement of the premises occupied by Kiger, and which pair, it is claimed, were his shoes and had been worn by him. Both Kiger and his wife deny that they were his shoes. Many circumstances appear to indicate that they were his. It is claimed, on behalf of the receiver, that the method of wear on these shoes, and the repairs made to them, indicate that Kiger's manner of walking was the same before as after the

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injury for which this action is brought. The significance to be given to the evidence disclosed by these shoes, and the manner in which Kiger walked, was a matter depending very largely upon the credit given by the trial court to the various witnesses who testified on the subject, and that testimony was in serious conflict. A number of witnesses testify that before the last injury Kiger walked normally, and it also appears from the evidence that before his last injury, being the one on which this action is based, he was performing regularly the work of a railroad switchman. So far as this branch of the case is concerned, we can not, therefore, interfere with the action of the trial court.

Two detectives employed by the receiver after the first trial testify that when Kiger walked, and believed he was not under observation, he placed the bottom of his left foot flat upon the ground or walk; while numerous neighbors and several medical witnesses called by Kiger testify that he walked with the inside of his left foot raised, and the foot turned outward; and the medical witnesses further say that it was impossible to straighten his foot or ankle so that it could be placed in a natural position flat upon the ground. If the claim made by the receiver in this respect were substantiated by the evidence, it would follow that Kiger was guilty of malingering and attempting thereby, both before and at the trial, to deceive the court as to the nature and extent of his injuries.

The rule announced by the courts in cases where it is attempted to secure a new trial by reason of newly-discovered evidence is that such new trial

ought not to be granted unless the legitimate effect of such evidence, when considered in connection with that produced on the trial, ought to have resulted in a different verdict. See *C., C., C. & I. Rd. Co. v. Long*, 24 Ohio St., 133.

Many of the authorities so state the rule as to prohibit the granting of a new trial for newly-discovered evidence, unless the evidence is of such a character as to require a different verdict or finding, and this language is used in the opinion of Judge McIlvaine in giving the reasons on which the supreme court based the judgment in the case just cited.

This court in the case of *Bridge v. State*, 20 C. C., N. S., 231, laid down the rule that the new evidence must be of such a character as to require a different verdict, before it would justify a new trial. See also *Searles v. State*, 6 C. C., 331, 344, and *Cincinnati Traction Co. v. Fesler*, 31 C. C., 631. The authorities are collected in 29 Cyc., 901.

Furthermore, it is said in *Kroger, Admr., v. Ryan*, 83 Ohio St., 299, 306, that new trials on the ground of surprise are and should be granted with great caution, and the granting or refusing of motions on this ground rests largely in the sound discretion of the trial court. The same subject is fully considered by the supreme court in *Hurley v. State*, 6 Ohio, 399, 404, and in *Smith v. Bailey*, 26 Ohio St., 1. See also *Stuckey et al. v. Bloomer, Admr.*, 2 C. C., 541, 542, and *Weber et al. v. Wiggins*, 11 C. C., 18.

After a careful review of the evidence, we are unanimously of the opinion that the judgment is not so manifestly against the weight of the evi-

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dence as to require or justify a reversal, and the same will, therefore, be affirmed.

Judgment affirmed.

CHITTENDEN, J., concurs.

KINKADE, J. I concur in the judgment of affirmance of the judgment below, denying the prayer of the petition for a new trial, but I desire to add that the evidence offered upon the hearing of this petition strongly confirms my former opinion in the main case that the verdict returned was the result of passion and prejudice on the part of the jury.

SCHOTT, SHERIFF, v. BENCKENSTEIN ET AL.

Contempt—Depositions—Commissioner appointed by a court in another state—Power to commit for contempt.

A commissioner bearing a commission from a court in another state, authorizing him to take depositions in this state, can compel the giving of testimony by committing to jail for contempt a witness who refuses to be sworn.

(Decided March 18, 1915.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Maxwell & Ramsey, for plaintiff in error.

Messrs. Bruce & Bruce and *Mr. S. A. Headley*, for defendants in error.

JONES, E. H., P. J. The sole question presented to this court in this case is whether or not a com-

missioner bearing a commission from a court in the state of New York, authorizing him to take depositions in this state, can compel the giving of testimony by committing to jail for contempt a witness who refuses to be sworn.

It is well settled by the case of *DeCamp v. Archibald*, 50 Ohio St., 618, that a notary public of Ohio before whom depositions are being taken for use in Ohio can commit to jail a contumacious witness. This authority is unquestionably conferred upon such notary by Section 11510, General Code, which reads as follows:

"Sec. 11510. Disobedience of a subpoena, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required."

And Sections 11529 and 11530, General Code, provide:

"Sec. 11529. Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission.

"Sec. 11530. Depositions taken in and to be used in this state, must be taken by an officer or person whose authority is derived within the state; but, if for use elsewhere, they may be taken before a commissioner or officer who derives his authority

from the state, district or territory in which they are to be used."

The answer to the question propounded to us depends wholly upon the construction of these and other sections contained in Part Third, Title 4, Division 3, Chapter 3 of the General Code, and particularly upon the meaning to be ascribed to the word "officer" as used in Sections 11510, 11530, 11543, and others of said chapter. In the latter section the word "officer" certainly includes one appointed under a special commission to take testimony in another state for use in a court in this state. It follows that the word "officer," used in Section 11510 of the same chapter, in like manner includes the commissioner who may be appointed under Section 11530 to take depositions to be used elsewhere. The word "officer," as used in this chapter, cannot be limited to magistrates and others who have taken an oath, given bond, etc., as argued by counsel. In order to make the statutes on the subject consistent and effective, it is obvious, we think, that the word "officer" must be held to include all persons authorized to take depositions.

We are, therefore, of the opinion that the word "officer" as used in Section 11510 was intended to and does embrace a commissioner appointed by a court of another state to take testimony in Ohio. Such being our construction of this section, it follows that the commissioner so appointed has power to punish as a contempt an unlawful refusal to answer as a witness or to subscribe to a deposition.

It is argued that, adopting the above construction, the law is unconstitutional for the reason that the power to punish for contempt is a judicial

power which under our constitution can be conferred only upon a court. This point has been passed upon by our supreme court in the case of *DeCamp v. Archibald*, *supra*. We quote from the syllabus, as follows:

"The power conferred by sections 5252 and 5254, Revised Statutes, on a notary, or other officer, in taking depositions, to commit a witness to the jail of the county for refusing to answer a question, is not judicial in the sense of the constitution, conferring all judicial power upon the courts of the state."

The judgment of the lower court will therefore be reversed and the defendants in error remanded to the custody of the sheriff.

Judgment reversed.

JONES, OLIVER B., J., concurs.

GORMAN, J., dissenting. I find myself unable to concur in the conclusions of my associates as to the right of the commissioner in this case to commit for contempt.

Section 11510, General Code, provides that a refusal to answer may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required. This section provides, therefore, only for the punishment by the court or an officer. An officer within the meaning of this section means an *officer of the state of Ohio*; and under Section 2, General Code, a commissioner who derives his authority from a state other than this state is *not an officer of the state of Ohio*.

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While a commissioner appointed by authority of another state may take depositions in this state, under favor of Section 11530, General Code, I am of the opinion that the legislature has simply recognized his right to take depositions in this state when the witnesses appear voluntarily and consent to give their testimony. I do not think that any person can have the power and authority to deprive a citizen of this state of his liberty, unless he be *an officer of this state duly authorized so to do* or a court of this state.

The appellate division of the supreme court of New York, in the case of *People, ex rel. MacDonald, v. Leubuscher*, 34 App. Div., 577 (54 N. Y. Supp., 869), held: That under the Constitution of the United States (Amendment 14, Section 1), providing that no state shall deprive any person of life, liberty, or property without due process of law, Sec. 920, Code Civ. Pro., providing that a person who refuses to testify before a commissioner appointed to take depositions "is liable to the penalties which would be incurred in a like case if he was subpoenaed to attend the trial of an action in a justice court; and for that purpose, the officer, before whom he is required to appear, possesses all the powers of a justice of the peace upon the trial,"—who, under Section 3001, has power to imprison a witness for refusal to testify before him—is unconstitutional as applied to a commissioner appointed by a court of another state to take depositions in that state, and who seeks thereunder to imprison for contempt.

It is also true that Judge Sayler, while on the common pleas bench, in the case of *In re Goodman*,

7 N. P., 201, took the same view of the case pending before him as I take in this case. In the *Goodman case* he discharged on *habeas corpus* a witness who was committed by the commissioner appointed by the surrogate court of New York to take testimony in this city. He was of the opinion that the commissioner was not an officer of Ohio, and therefore not authorized to commit for contempt.

The supreme court of Kansas, in *In re Huron*, 58 Kans., 152, laid down the same rule as the New York appellate division of the supreme court in the case above cited.

Our supreme court in the case of *DeCamp v. Archibald*, 50 Ohio St., 618, held that a witness before a notary public, where depositions were being taken to be used in an action pending in this state and in this county, could be committed by the notary, and that the notary had power to commit for contempt of court. But we think that case is distinguishable from the one at bar because a notary public is an officer of this state. He is duly appointed and commissioned by the governor, is obliged to give bond and take an oath of office, as all officers are required to do under Section 2, General Code.

For the reasons stated I am of the opinion that the judgment of the court of common pleas in discharging defendants in error should be affirmed.

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Mehmert v. Kelso.

MEHMERT v. KELSO.

Injury by dog — Knowledge of vicious propensities — Liability for injuries inflicted.

The owner or harbinger of a dog is liable in law for the injuries inflicted by such animal, regardless of the viciousness or fierceness of the dog. Ignorance of the dog's vicious propensities does not relieve the owner or harbinger from liability.

(Decided April 19, 1915.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Cramer & Headley, for plaintiff in error.

Mr. Harry Hess, for defendant in error.

GORMAN, J. The action below in the superior court of Cincinnati was brought by defendant in error, Martha Kelso, to recover damages resulting from a dog-bite.

Plaintiff below averred that she had been severely bitten by a large dog harbored and kept by defendant, Joseph Mehmert; that said dog was fierce and dangerous and accustomed to bite mankind, all of which was well known to defendant; and that the dog was allowed to run at large. She claimed \$5,000 general damages and \$89.55 special damages in the way of doctor's bill and expenses of nursing and medicine.

A general denial was filed.

On the trial a verdict was rendered in favor of plaintiff in the sum of \$500. A special verdict or finding was also returned by the jury at the request of defendant, as follows:

"The defendant requests the court to instruct the jury to answer in writing the following question: First: Was the defendant Joseph Mehmert the owner or harbinger of the dog causing the alleged injury to plaintiff? Answer. Yes.

"WARREN WILDER, *Foreman.*"

A motion for a new trial having been denied, error is prosecuted to this court, and a judgment of reversal is asked. Three grounds of error are set out, viz.:

1. That the damages are excessive.
2. That the verdict is not sustained by sufficient evidence and is contrary to law.
3. That the court erred in refusing four special charges requested by defendant below.

As to the first ground, it is not seriously claimed that \$500 is an excessive verdict under the evidence in the case, which disclosed that Mrs. Kelso was severely bitten, confined to her house for six weeks, obliged to employ a distinguished surgeon and a nurse, and was at the time of the trial in a highly nervous condition as the result of the dog-bite. If she was entitled to recover at all, the verdict was inadequate rather than excessive.

As to the second ground of error, it may be said that there was sufficient evidence to sustain the verdict. Furthermore, on the main issue in the case the jury found in its special verdict or finding that the defendant, Joseph Mehmert, was the owner or harbinger of the dog that bit Mrs. Kelso, and there can be no question but that the evidence was sufficient to warrant such a finding. If he was either the owner or the harbinger of the dog, and the

plaintiff was bitten by it, then regardless of the viciousness or fierceness of the dog the defendant was liable in law for the injuries sustained by plaintiff. Section 5838, General Code.

The common-law rule, sometimes tersely put that "every dog is entitled to one bite," has no application now when there is a remedy afforded under the above-cited statute.

Ignorance of the dog's vicious propensities does not relieve the owner or harbinger from liability. *Job v. Harlan*, 13 Ohio St., 485, and *Gries v. Zeck*, 24 Ohio St., 329.

As to the third ground of error claimed, the refusal of the court to give special charges 2, 3 and 4, it is sufficient to say that a perusal of these charges as set forth in the record satisfies us that the defendant below was not entitled to have any one of them given.

The second special charge ignores entirely the question of whether or not the defendant harbored the dog, but in a complex, involved and long-drawn-out charge, based not upon the evidence of the case but upon defendant's theory of what constitutes harboring, the court was asked to tell the jury that if certain conditions existed then defendant was not the harbinger of the dog in question.

The third special charge is open to the same criticism as the second charge, in that it asks the court to tell the jury that unless the defendant acted toward the dog as owners usually do, he could not be found to be the harbinger of the dog.

The fourth special charge ignores entirely the question of the harboring of the dog by defendant, and, further, seeks to relieve him from liability

if the dog was owned by his son and the biting did not take place on defendant's premises.

The general charge of the court was as favorable to defendant as he had a right to ask. Indeed it was more favorable than defendant was entitled to have it. The verdict was neither contrary to law nor against the weight of the evidence.

We are of the opinion that no complaint can be fairly made in this case by the defendant, and that substantial justice has been done.

Judgment affirmed.

JONES, E. H., P. J., and JONES, OLIVER B., J.,
concur.

RITTER v. THE CITY OF TOLEDO.

Negligence—Municipal corporations—Sidewalk not defective, when.

A petition to recover damages for personal injuries caused by slipping on an icy sidewalk, where the only complaint made against the walk is that it has an incline of ten inches in seven feet, and was covered with ice produced by natural causes, does not state a cause of action.

(Decided March 27, 1916.)

ERROR: Court of Appeals for Lucas county.

Messrs. Graves & Stahl, for plaintiff in error.
Mr. Harry S. Commager, director of law, and
Mr. Charles T. Lawton, for defendant in error.

RICHARDS, J. This action was commenced by Frances Ritter in the common pleas court to re-

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cover damages for a personal injury resulting from a fall on an icy sidewalk. The petition was met with a demurrer, which was sustained in the trial court, and, the plaintiff not desiring to plead further, final judgment was rendered dismissing her petition. To this action of the court she prosecutes error.

The allegations in the petition as to the precise location and situation of this walk are somewhat complicated, but, for the purpose of determining the point involved, it is only necessary to say that the petition discloses that the walk was a slanting or inclined one, in width covering a distance of seven feet from its inside edge to the curb line, and that in said seven feet the extent of the incline was ten inches. The petition alleges that five or six days before the injury this sidewalk became covered with ice and was very slippery, and that the plaintiff had no knowledge of its dangerous condition, but that its condition was known to the defendant, or would have been known to it in the exercise of ordinary care.

The simple question for determination is whether these allegations show such a condition as casts a liability on the city. Counsel for plaintiff insist that the petition is sufficient, and that the allegations, if established by evidence, would require that the case be submitted to a jury, and to sustain this position they rely very largely on the case of *Gibbs v. Village of Girard*, 88 Ohio St., 34. In that case the record disclosed what is called in the opinion a "sudden and immediate two-inch drop" in the sidewalk, and it was held that the case should have been submitted to the jury to deter-

mine as to the negligence of the village. That case was disposed of on a motion for a directed verdict, and the supreme court held that, for the purposes of the motion, the defect must be admitted. We can not extend the doctrine of the *Givard case*, founded, as it is, on a defective walk, to one where the only criticism of the walk is that it is built on an incline, as set forth in the petition. The case under consideration there was one of a defective walk, and we have, therefore, to inquire whether the condition of the walk, as set forth in the petition in this case, discloses that the walk is defective.

We can not hold that a walk which is built on on incline of ten inches in seven feet is a defective walk, or one which of itself renders the municipality liable in damages to persons injured by falling thereon. To so hold would result in the bankruptcy of municipalities which are so unfortunate as to be built in hilly localities. A sidewalk in order to have drainage must be built either on a slant or crowning, and it can hardly be said to be negligence for a municipality to permit a walk to remain in such condition; nor can it be said that it is negligence to construct a walk on a street which is not level.

The supreme court held in *Chase v. City of Cleveland*, 44 Ohio St., 505, that it is not actionable negligence for a city to suffer ice and frozen snow to accumulate on a sidewalk and be beaten smooth and slippery, and for that reason dangerous to those passing along it; and it is said in that case that the condition was transient in character and not such as to ordinarily require the interference

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of the city authorities for its abatement, the duty of the municipality being to exercise only ordinary care. To prohibit the construction of such a walk as is described in the petition in this case, or to hold municipalities liable by reason of such construction, would be impracticable.

Another case to which we call attention is *City of Norwalk v. Tuttle*, 73 Ohio St., 242. In that case a recovery was denied the plaintiff for damages suffered by falling on an icy sidewalk, because the conditions did not disclose any structural defect in the walk, and the city was not liable for the icy surface, that slippery condition being the result of natural causes.

Under the doctrine of the two cases last cited, a recovery would be impossible in the case at bar without holding that the walk as constructed was structurally defective, and to so hold would overturn fundamental principles and be manifestly unjust to municipalities. A petition to recover damages for an injury caused by slipping upon an icy sidewalk, where the only complaint made against the walk is that it has an incline of ten inches in seven feet, and was covered with ice produced by natural causes, does not state a cause of action, and the demurrer thereto was properly sustained.

The judgment of the court of common pleas will be affirmed.

Judgment affirmed.

CHITTENDEN and KINKADE, JJ., concur.

IN RE BALDRIDGE:

BADER, SUPERINTENDENT, v. MCCARTIN.

Vagrants—Loitering—Habeas corpus—City ordinance—Powers of municipalities—Validity of ordinance defining and punishing vagrancy.

While cities are without authority to punish loiterers as such, they have ample authority to punish vagrants, and an ordinance passed in the exercise of such power is not invalid because the word "loitering" is used in defining the offense, and in creating the class of vagrants contemplated.

(Decided May 10, 1915.)

ERROR: Court of Appeals for Hamilton county.

Mr. Walter M. Schoenle, city solicitor, and *Mr. E. S. Morrissey*, prosecuting attorney of municipal court, for plaintiff in error, Fred Bader, superintendent of the Cincinnati workhouse.

Mr. Jas. J. McCartin, in *propria persona* and for John Baldrige.

JONES, E. H., P. J. John Baldrige was convicted of a violation of Section 907 of the ordinances of Cincinnati, which we reproduce below.

Baldrige was discharged from prison by the insolvency court on a writ of *habeas corpus*, on the ground that said ordinance is invalid. In so deciding, it appears that the learned judge felt bound by the decision of the circuit court in *In re Opal Howard*, 15 C. C., N. S., 171. The court in that case held that the ordinance upon which that prosecution was based was invalid for the reason that the state of Ohio through its general assembly had

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not delegated to the city the power to pass such an ordinance.

This calls for a comparison of the ordinances to see whether or not the present ordinance bears the infirmity which was pointed out in the ordinance involved in the *Howard case*. That ordinance reads as follows:

"Sec. 907. If * * * any person shall be found loitering about any common barroom, dram shop, gambling house or house of ill fame, or wandering about the streets either by night or day without any lawful means of support," etc., such person shall be fined, etc.

The agreed statement of facts embodied in the bill of exceptions herein states that Baldridge "was arrested and prosecuted by virtue of Section 907 of the Code of Ordinances of the city of Cincinnati, passed February 4, 1913, which section reads as follows:

" 'Be it ordained by the Council of the City of Cincinnati, State of Ohio,

" 'Sec. 1: That section 907 of the Code of Ordinances be amended to read as follows: Sec. 907. LOITERING— Any person found loitering about any street, alley, avenue, park or public or private place within the city of Cincinnati without legal means of support, who being able to work for the support of himself or herself at honest industry, intentionally lives idly and without endeavoring in good faith to obtain lawful work or employment, shall be deemed a vagrant and, on conviction thereof, shall be fined not less than one or more than fifty (\$50) dollars for each offense.'

"That the said John Baldridge was tried on or about the 23rd day of February, 1915, and convicted of said offense."

Some question was raised in oral argument about the affidavit upon which Baldridge was arrested, and the claim was made that it did not state facts sufficient to constitute an offense under the present ordinance.

The papers in the case in the municipal court were not in evidence in this case. No documents are attached to the bill of exceptions, and it contains copies of none. This case was submitted to the insolvency court on an agreed statement of facts, to which reference has been heretofore made. That statement of facts contains no reference to the affidavit for arrest and it cannot be regarded as part of the record in the case under review.

The record here presents but one question, i. e., the validity of the ordinance of February 4, 1913. It shows that Baldridge was arrested, prosecuted and convicted for its violation. This ordinance defines "vagrancy" and fixes a penalty therefor.

Section 3664, General Code, authorizes such legislation by a municipality:

"Sec. 3664. To provide for the punishment of persons disturbing the good order and quiet of the corporation, by clamor and noise in the night season, by intoxication, drunkenness, fighting, using obscene or profane language in the streets and other public places to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by lewd or lascivious behavior. In like manner to provide for the punishment of any vagrant, common street beggar, com-

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mon prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch-stuffer, ball-game player, a person who practices any trick, game or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself."

The former ordinance which was declared invalid in *In re Opal Howard* differed from this in that it prohibited "loitering" only, and made no mention of "vagrant" or "vagrancy."

While the statute gives authority to punish all vagrants, the ordinance only embraces by its terms a class of vagrants described therein, and in this respect the lawmaking body of the city has not exercised all the power granted to it. By the former ordinance it was sought to punish loiterers, not all loiterers, but only such as were described therein. But it was invalid, and so decreed, because of the lack of any authority in cities to punish "loiterers," as such. There is given ample authority to punish vagrants, and this ordinance passed in the exercise of such power is not to be overthrown because the word "loitering" is used in defining the offense, and in creating the class of vagrants contemplated.

We are of the opinion, therefore, that the city acted entirely within the power delegated by said Section 3664, General Code, in passing the existing ordinance, and that it is a valid enactment.

Judgment reversed.

JONES, OLIVER B., and GORMAN, JJ., concur.

IN RE WHALLON.

Alimony—Contempt—Habeas corpus—Inherent power of court to enforce decree—Enforcement of payment of alimony in gross—Inability of defendant to pay, how established—Habeas corpus not the proper remedy, when.

1. Every court has inherent power and authority to enforce its decrees, if it had jurisdiction to make the order or decree, and the general assembly is without authority to abridge or deprive a court of power and authority to enforce its valid decrees, orders and judgments by contempt proceedings or such other proceedings as are necessary to establish its authority and respect as a court.
2. Imprisonment for contempt in failing to pay a judgment for alimony in gross is not violative of any constitutional right of the person duly imprisoned on such a charge of contempt for failure to obey the order.
3. An order of commitment for contempt imports verity, and it will be presumed that the court heard the evidence and found the defendant was able to pay the amount adjudged against him. It is incumbent upon the defendant to establish his inability to pay, and in the absence of a bill of exceptions containing the evidence, if any was offered, the presumption will be that the defendant failed to establish his inability to pay.
4. If the court has jurisdiction of a cause and proceeds irregularly or in an erroneous manner, the remedy is not *habeas corpus*, but proceedings in error.

(Decided May 3, 1915.)

ERROR: Court of Appeals for Hamilton county.

Mr. W. A. Rinckhoff, for respondent.

Mr. C. S. Sparks, for Whallon.

ORMAN, J. This is a proceeding in error to reverse a judgment of the common pleas court discharging J. Harry Whallon from the custody of the sheriff of Hamilton county, who held him in

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the county jail under a judgment and commitment of the insolvency court of Hamilton county.

On December 23, 1913, the insolvency court of Hamilton county, in an action for divorce and alimony brought by Ella J. Whallon against her husband, J. Harry Whallon, then pending in said court, decreed a divorce to said Ella J. Whallon on account of the aggressions of her husband, and awarded her in gross the sum of \$175 as and for alimony and attorneys' fees, and rendered judgment in her favor for said sum.

The order and judgment of the court as to the payment of the alimony not having been complied with, a rule was issued on the motion of the wife, directing the husband J. Harry Whallon to show cause in said insolvency court on or before March 6, 1915, at 10 o'clock, A. M., why attachment for contempt should not issue against him for disobedience of the said order directing him to pay said sum of \$175. Whallon was thereupon brought into court, charges of contempt filed against him, and he was found guilty of contempt of court for failing to pay the sum of \$150, being the balance unpaid of said judgment for alimony. He was thereupon committed to the jail of Hamilton county until said sum should be paid, or until the further order of the court, or until discharged by operation of law.

Thereupon, on March 16, 1915, said Whallon sued out a writ of *habeas corpus* in the common pleas court, and that court found that he was illegally restrained of his liberty, and discharged him from custody.

The case is now here on error to reverse that judgment.

The ground upon which the court of common pleas held the detention of Whallon to be illegal was that the insolvency court of Hamilton county had no jurisdiction to commit said Whallon, because by the act of the general assembly passed February 6, 1914 (104 O. L., 179-180), that court was deprived of jurisdiction in actions for divorce and alimony after December 31, 1914, and the order of the insolvency court in committing said Whallon for failure to pay alimony having been made after December 31, 1914, in an action for divorce and alimony, the same was null and void for want of jurisdiction to make the order.

At the time the decree for alimony was rendered, December 23, 1913, the court of insolvency of Hamilton county undoubtedly had jurisdiction to hear and determine actions for divorce and alimony under the delegation of power and authority contained in Subdivision 9 of Section 1637, General Code, so that the decree awarding Mrs. Whallon alimony was a valid, binding judgment and order, and enforceable against J. Harry Whallon either by execution or by attachment and commitment for failure to obey the same.

Did the insolvency court by the amendment of said Subdivision 9 of Section 1637, on February 6, 1914, lose jurisdiction after December 31, 1914, to enforce its judgments, orders and decrees made prior to that date? We think it did not, but that it as well as every court had inherent power and authority to enforce its decree if it had jurisdiction to make the order or decree. The general assembly

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is without authority to abridge or deprive a court of power and authority to enforce its valid decrees, orders and judgments by contempt proceedings or such other proceedings as are necessary to establish its authority and respect as a court. It may create courts inferior to the courts of appeals, and it may limit or enlarge their jurisdiction and powers, but so long as the court continues to exist as a court it cannot be deprived of its inherent power to enforce its decrees, orders and judgments. If this power should be taken from a court, then it would cease to be a court and would lose the respect and dignity with which the people have clothed it.

"The power, therefore, [to enforce its decrees and orders] arose upon the creation of a court because it was implied in every conception of a court."

It was well said by Judge Shauck in the case of *Hale v. The State*, 55 Ohio St., 210, at page 213:

"The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and

to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised. * * *"

See also *Respublica v. Oswald*, 1 Dall., 319 (343).

Numerous other authorities might be cited to establish the elementary proposition that all courts have inherent power to enforce their decrees, orders and judgments, but we think it sufficient to cite only a few of them: 8 Am. & Eng. Ency. of Law (2 ed.), 28, 29; *State v. Frew & Hart*, 24 W. Va., 416; *Little v. State*, 90 Ind., 338; *People v. Wilson et al.*, 64 Ill., 195, and 7 Am. & Eng. Ency. Law (2 ed.), 30.

This power to enforce the decrees and orders of a court, even by contempt proceedings if necessary, the legislature cannot take away, because it can be exercised regardless of the consent of the legislature. If power distinguished from jurisdiction exists independently of legislative action, it will continue to exist notwithstanding legislation.

The insolvency court of Hamilton county still lives. It has not been abolished, nor have its powers to enforce its valid orders been abridged or curtailed. The order requiring Whallon to pay to his wife this sum of money is a valid subsisting order, and the court had ample power to compel Whallon to obey it.

What might be the status of a decree or judgment granting a divorce or alimony since January 1, 1915, we do not decide, as that question is not presented to us by the record in this case. The jurisdiction of that court to hear and determine

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divorce and alimony actions since December 31, 1914, is not raised by the record.

The second question involved in this case is as to the power or authority to punish as for contempt of court the refusal to pay a judgment for alimony in gross. Is this a judgment for a debt, which can only be enforced by execution and levy on property, and which cannot be enforced by imprisonment in contempt proceedings? We think that this question has been decided adversely to the contention of counsel for J. Harry Whallon in the cases of *State, on Complaint of Cook, v. Cook*, 66 Ohio St., 566, and *Lubbering v. State*, 19 C. C., 658.

In the case of *State, etc., v. Cook*, the second paragraph of the syllabus reads as follows:

"A final money decree for alimony is not a debt within the purview of the constitutional inhibition against imprisonment for debt, but is such an order as that, under favor of section 5640, Revised Statutes [Section 12137, General Code], punishment as for a contempt may follow willful failure to comply with it."

In the case of *Lubbering v. State, supra*, the circuit court of this county held that the court has power to imprison for failure to pay a judgment in gross awarded as alimony.

Therefore we think it may be said to be fairly established in this state that imprisonment for contempt, in failing to pay a judgment for alimony in gross, is not violative of any constitutional right of the person duly imprisoned on such a charge of contempt for failure to obey the order.

Thirdly, it is claimed that the record fails to show that Whallon was able to pay the alimony at the time the court of insolvency ordered him committed, and that the fact should appear in the record that he is able to pay before any valid commitment can be made.

The order of commitment for contempt imports verity, and it will be presumed that the court heard the evidence and found the defendant was able to pay the amount adjudged against him. (*Galley v. Galley*, 13 C. C., N. S., 522.) It was incumbent upon the defendant Whallon to establish his inability to pay, and in the absence of a bill of exceptions containing the evidence, if any was offered, the presumption is that the defendant failed to establish his inability to pay. *Galley v. Galley*, *supra*.

Furthermore, the failure of the record to disclose ability to pay, on the part of Whallon, cannot be raised in this *habeas corpus* proceeding. This question would have to be raised in error proceedings. If the court had jurisdiction of the person of Whallon and of the subject-matter — contempt of court — then any and all errors claimed to exist in the record must be taken advantage of by error proceedings, and not in a collateral attack. *Effinger v. State*, 11 C. C., 389, and 1 Bailey on Habeas Corpus, 284-288.

Habeas corpus cannot be employed to review errors of the court. 15 Am. & Eng. Ency. of Law (2 ed.), 172.

If the court has jurisdiction of a cause and proceeds irregularly or in an erroneous manner, the remedy is not *habeas corpus*, but proceedings in

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error. *Lillibridge v. State, ex rel. Stewart*, 7 C. C., N. S., 452.

So far as we are advised by the record in this case Whallon was able to pay. We have a right to presume that the court of insolvency so found before ordering him committed; but if the court did not so find, then an error proceeding is the proper remedy to employ to raise the question.

Being satisfied that the court of insolvency had jurisdiction of the person of Whallon, and of the subject-matter, contempt, we conclude that the court of common pleas erred in discharging J. Harry Whallon from custody, and the judgment of that court is reversed.

Judgment reversed.

JONES, E. H., and JONES, OLIVER B., JJ., concur.

MCDONALD & FRAZIER v. SCHERVISH.

Life insurance—Inducements to insure—Rebates—Note without interest—Section 9404, General Code—Negotiable instruments—Consideration—Suit on note.

Where the evidence is to the effect that a contract was entered into for a policy of life insurance and the amount of the premium agreed upon, and thereafter a note was accepted from the insured for the first year's premium, due in sixty days without interest, the accommodation thus extended as to the time for paying the first premium can not be regarded as an inducement for taking out the policy, or as within the inhibition of Section 9404, General Code; and where the insured made no complaint until after the note had become due and the agents receiving it had paid the premium to the insurance company, the defense that the note was void because in contravention to said section does not lie.

(Decided May 6, 1916.)

ERROR: Court of Appeals for Muskingum county.

Mr. E. R. Meyer, for plaintiffs in error.

Mr. J. C. Bassett, for defendant in error.

Houck, J. This is a proceeding in error seeking to reverse a judgment of the common pleas court of Muskingum county, Ohio. The parties occupy the same position in this court as in the court below, the basis of the suit being a promissory note for \$152 given to McDonald & Wagner by Herb Schervish in payment of the first premium on a life insurance policy in the Bankers' Life Insurance Company of Nebraska, which policy was sold by McDonald & Wagner, the agents of said insurance company, to the said Schervish, the note in turn be-

ing sold and transferred by said McDonald & Wagner to the plaintiffs in error, who filed suit thereon in the common pleas court of this county, the petition being drawn under the usual short form of petition on promissory notes.

The answer contains three defenses:

1. It admits the plaintiffs are the owner and holder of the note in question; admits its execution, delivery, and the endorsements thereon; but denies all the other allegations of the petition, and especially avers that the note was given without any consideration.

2. That the note was null and void, and against public policy, and in violation of Section 9404, General Code of Ohio, because the plaintiff's assignors, in order to induce the defendant to take a \$5,000 life insurance policy at the usual rate of annual premiums, agreed to defer the payment of the first premium for 60 days, without interest, instead of requiring the same to be paid in cash as the policy provided.

3. That the defendant was induced to take said insurance by reason of certain false and fraudulent statements made to him by the original payees of the note, in this, to-wit, that said policy, at the end of 20 years, if the insured paid the annual premiums thereon, would entitle the insured to receive in cash not less than \$4,800, nor more than \$5,200; which representation and others made to him at that time were not true.

Plaintiff's reply to said answer admits that McDonald & Wagner were the agents of the said Bankers' Insurance Company; that the first premium was payable on delivery of the policy; that

McDonald & Wagner, in lieu of payment in cash, accepted said note for such premium; and denies all the other allegations in the answer.

On these pleadings and the evidence the cause was submitted to a jury and a verdict returned for the defendant. The usual motion for a new trial was filed, heard and overruled, and a judgment entered on the verdict. The plaintiffs in error seek a reversal of this judgment for the reason that the verdict of the jury and the judgment entered thereon are against the manifest weight of the evidence and contrary to law.

It is claimed by the defendant in error that there was a rebate in his favor when he was permitted to give the 60-day note in suit, without interest, in payment of the first premium on said policy.

We find from an examination of the bill of exceptions that the great weight of the evidence is to the effect that the contract for the policy and the amount of the premium were agreed upon before the execution of the note, and that the question of the time of the payment of the first premium could not have been and was not in any way an inducement to the defendant in error to take the policy.

The defendant in error claims that the note is void under favor of Section 9404, General Code, which is as follows:

"No life insurance company doing business in this state, or any officer, agent, solicitor, employee, or representative thereof, nor any other person, shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to insurance, nor shall any person, co-partnership or corporation knowingly receive as such inducement

to insurance any rebate of premium payable on the policy or any special favor or advantage in the dividends or other benefits to accrue thereon, or any special advantage in the date of a policy or date of the issue thereof; or any valuable consideration or inducement whatsoever; or give or receive, sell or purchase, or offer to give or receive, sell or purchase, as inducements to insurance or in connection therewith any stock, bonds or other obligations or securities of any insurance company or other corporation, association, partnership, or individual. * * *

If we rely upon the facts as to the execution and delivery of the note in question, as disclosed by the testimony in the bill of exceptions, we have no hesitancy in saying that none of the provisions of said section of the code has been violated. The contract entered into by the defendant in error for said policy of insurance, and the note executed and delivered by him for the first premium, can not be set aside and held for naught, unless the violation of the statute be established by clear and convincing evidence. The defendant in error made no complaint until after the note had become due, and not until after the payees had settled with the insurance company.

As to the misrepresentations claimed by the defendant in error, counsel earnestly urges that defendant in error did not receive the kind of policy he was led to believe he was getting; that the settlements shown and represented to be on similar policies were not only not similar, but were known by the agent not to be similar. It is not a question of opinion as to what the earnings of the company

would be, but a question whether the representations as to the sameness of the policies were not only false, but known to be false by the agent, and believed by the defendant in error. If the contention of the defendant in error is sound, then a recovery could not be had upon the note in suit, because it was obtained in fraud of the rights of the defendant in error.

Fraud is never presumed, but must be established by clear and convincing evidence. This, as we view the testimony as set forth in the bill of exceptions, has not been done — the burden of establishing the facts alleged in the answer being upon the defendant in error. We think it has not been done by that degree of proof required by law.

From what we have already said it necessarily follows that in our opinion the note is founded upon a sufficient consideration, and therefore we need not pursue that question further.

We therefore find that the verdict of the jury was against the manifest weight of the evidence and contrary to law, and that the trial court erred in entering a judgment on the verdict. Finding error in the record prejudicial to the rights of the plaintiffs in error, the judgment of the common pleas court must be reversed, which is now done, and the cause is remanded to the court from whence it came for further proceedings.

Judgment reversed, and cause remanded.

SHIELDS and POWELL, JJ., concur.

FARRELL v. THE ROCHE-BRUNER BUILDING CO.

Negligence—Proximate cause of accident—Use of chain-driven automobile truck.

Plaintiff was employed by defendant in loading brick upon an automobile truck at one point and unloading same at another point, and with other men similarly engaged was permitted to ride on the truck. While so riding he sat with his feet hanging over the side and directly over the sprocket wheel and chain by which the truck was propelled. The truck was driven near an approaching wagon, and, fearing for his safety, plaintiff instinctively drew back his leg, which was thereby caught in the sprocket and chain and crushed so that amputation was necessary. The evidence showed that seventy per cent. of all automobile trucks are chain driven, and that the sprocket and chain are in all makes exposed and uncovered. Plaintiff had a choice of position upon the truck and there was ample opportunity for him to have placed himself where he would have been in no danger whatever from the sprocket wheel and chain. *Held:* That no negligence can be attributed to defendant from the use of such chain-driven automobile truck, and that the proximate cause of the plaintiff's injury was his own act in placing himself upon the truck at such point as to be in danger.

(Decided June 21, 1915.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Shuey & Anderson, for plaintiff in error.

Messrs. Robertson & Buchwalter and *Mr. Theodore C. Jung*, for defendant in error.

JONES, OLIVER B., J. Plaintiff, Charles Farrell, was in the employ of the defendant and was engaged in loading brick upon an automobile truck at the railroad yards and unloading same from the truck at a building which was being constructed by

defendant on Main street in the city of Cincinnati. He and other men engaged in the same task were permitted to ride on the truck from the building to the railroad yards, and while so riding, at the time of the injury, March 17, 1913, he sat upon the side of the truck with his feet hanging over the side directly over the sprocket wheel and chain by which said truck was propelled, other men sitting on either side of him. When the truck arrived at the railroad yards it was driven within a few feet of an approaching wagon, and plaintiff, fearing for his safety, instinctively drew back his leg, which was thus caught in the sprocket and chain and was crushed so that amputation was necessary.

The defendant at the time employed more than five workmen in the same line of business, and had not then availed itself of the protection of the workmen's compensation law.

At the close of the evidence, the court, upon motion of defendant, directed the jury to return a verdict for the defendant, upon which a judgment was entered; and error proceedings are here prosecuted to set aside that judgment.

Two grounds of negligence were alleged in plaintiff's petition:

1. That the defendant "negligently and carelessly permitted and suffered the said sprocket and chain on said automobile to remain exposed and uncovered."

2. That the defendant "negligently and carelessly ran and moved said automobile truck dangerously close to a passing wagon, and that plaintiff reasonably anticipated bodily injury from col-

lision from said wagon and sought to withdraw himself from said apparent danger, that in so doing his leg became entangled in said sprocket and chain."

The bill of exceptions does not purport to contain all the evidence, but on the contrary it is certified that it is a "narrative form of the evidence produced by the parties and heard by the court on the question of negligence and the injury." The evidence in the bill of exceptions, however, shows that 70 per cent. of all truck automobiles known to the business are chain driven, and that the sprocket and chain in all makes are exposed and uncovered.

It appears also that the sprocket and chain are in a measure protected by the wheels and the edge or bed of the truck. These trucks are made for the purpose of hauling freight, and it is not intended that people riding upon them should extend their legs down over the side in the vicinity of the sprocket and chain.

It appears in this case that plaintiff had a choice of position upon the truck and there was ample opportunity for him to have placed himself where he would have been in no danger whatever from the sprocket wheel and chain. Had he so placed himself, no injury could have resulted from his fear of contact with the passing wagon, and there would have been no reason for his thrusting his leg in contact with the chain and sprocket, because of fear of such collision.

It therefore appears that no negligence can be attributed to defendant from the use of such chain-driven automobile truck, and that the proximate

cause of the plaintiff's injury was his own act in placing himself upon the truck at such point as to be in danger.

Error is urged, on the part of the plaintiff, in the court's refusal to allow him to prove that "a cotter pin in the sprocket wheel had been lost and defendant had replaced it with a wire, which extended some distance beyond the axle."

The refusal to admit such testimony is shown in the bill of exceptions, as follows:

"The court sustained the objection for the reason, that there was no allegation in the petition as to any negligence on account of a defective construction or condition of the sprocket wheel except that it was exposed, and the court offered to allow the plaintiff to amend his petition, which the plaintiff refused to do."

A careful consideration of the petition shows that the trial court was correct in its statement that no allegations of defective construction or condition of the sprocket wheel appeared in the petition, and plaintiff, having refused to avail himself of the opportunity offered by the court to amend his petition in that respect, cannot now be heard to complain of the refusal to receive such testimony.

The second defense of the answer of defendant set up a payment in full and a settlement and a release in bar by the plaintiff. There is nothing in the bill of exceptions to show what evidence was introduced in that respect, and, under the presumption in favor of the ruling of the trial court, it must be held that a directed verdict was justified under that defense.

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The court finding no prejudicial error, the judgment below is affirmed.

Judgment affirmed.

JONES, E. H., and GORMAN, JJ., concur.

THE CINCINNATI TRACTION CO. v. HACKETT.

Evidence — Admissibility of memorandum — Memory of witness as to event extinguished — Memorandum inadmissible unless virtually coincident with the event.

Where the memory of a witness as to an event is extinguished and a memorandum made by the witness is offered as substantive evidence, he testifying to it as correct but recollecting nothing as to its contents, it is inadmissible unless it is shown to be virtually coincident with the event, and this is eminently the case when the concoction is in view of litigation.

(Decided May 24, 1915.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Kinhead & Rogers, for plaintiff in error.

Messrs. Hackett, Yeatman & Rover, for defendant in error.

GORMAN, J. This is a proceeding in error to reverse a judgment of the court of common pleas. The defendant in error, May Hackett, recovered a verdict and judgment against the plaintiff in error, in the court below, for the sum of \$750, on account of personal injuries claimed to have been sustained by her on or about November 22, 1908, because of the sudden jerking of a car from which

she was alighting as a passenger near Eighth and John streets in Cincinnati.

Two grounds of error are claimed by plaintiff in error in its brief. The first is abandoned because of the decision of the supreme court, adverse to its contention on this point, in the case of *Brogan v. The Cincinnati Traction Company*, 91 Ohio St., 403.

This leaves but one ground of error to be considered by this court, to-wit: error of the trial court in refusing to admit in evidence a written and printed statement made by a witness the day after the accident occurred.

The record discloses that the defendant, for the purpose of showing that the plaintiff attempted to alight from the car before it had come to a stop and while it was in motion, offered a witness, Edward Pestrop, who testified that he was on the rear platform of the car on November 22, 1908, when plaintiff was alighting from the car. He remembered the day of the month and that it was Sunday at about 7:30 P. M. and near the corner of Eighth and John streets that the accident occurred. He was then asked:

"Q. Tell the jury what you remember about it, won't you?"

To which he replied:

"A. That is about all I remember. I don't remember seeing the woman get off or don't remember only what I have said on that statement there; that was my information of it at the time, the day after the accident."

He was then shown a statement consisting of printed questions, some of which were answered,

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and others not answered, in the handwriting of the witness and signed by him, purporting to have been made November 23, 1908, the day after the accident. The paper had been sent to him that day by the defendant, with the request that he fill in as many blank spaces as possible on the opposite side of the sheet of paper. The blank spaces filled in were in the handwriting of the witness. Among other questions and answers thereon were these three:

(Printed.) "Was the car standing or moving? If moving, how fast?"

(In witness's handwriting.) "Was moving slowly."

(Printed.) "If there was anyone injured or any property destroyed please state extent of same."

(In witness's handwriting.) "A woman fell while leaving the car."

(Printed.) "What in your opinion was the direct cause of the accident?"

(In witness's handwriting.) "The woman stepped from the car while it was in motion."

After examining the paper he was asked if reading the paper refreshed his recollection as to whether or not he saw the woman as she stepped off the car or went off the car. He answered:

"No, I don't remember seeing just how she stepped off now."

He was further asked:

"And looking at that paper, that does not bring it back to your mind?"

"No sir," he answered.

He said he saw the woman on the ground as she was being assisted to the sidewalk. He was

then asked if the statement was in his handwriting, and replied "yes." He was asked if the statements made on the paper were correct. Objection was interposed and sustained by the court. To which ruling of the court counsel for defendant excepted and offered to show by the witness, if he were permitted to answer, that they were correct. Counsel for defendant then offered the paper in evidence. Objection was made and sustained, and an exception taken. The paper is attached to the bill of exceptions and made a part of the record. There were witnesses who testified that the car had come to a stop and as plaintiff was in the act of alighting it was suddenly started with a jerk, throwing her from the car. There were other witnesses who testified that she attempted to alight before the car had stopped and while it was in motion. The jury answered a special interrogatory that the injury was not caused by the manner in which the car was brought to a stop near John street.

Was it error for the court to exclude this paper?

We think it was not. The only statement in the paper which can be claimed to aid the cause of the plaintiff in error is the one in answer to the question as to the witness's opinion as to what was the direct cause of the accident. The question as to the opinion of the witness as to what was the direct cause of the accident was clearly objectionable, and if the witness had been asked that question directly, while on the stand, it would have been the duty of the court to sustain the objection. How then can it be claimed that the wit-

ness's opinion may be secured *indirectly* by *admitting a paper in which he states his opinion as to the direct cause of the accident*, when it could not be obtained directly from him while under oath upon the stand? The paper could not be admitted without admitting this objectionable question and answer, and therefore the entire paper was properly excluded on this ground. It will be noticed that the witness was asked for his opinion as to the cause of the accident, not what *was the cause of the accident*. His answer was an expression of his opinion as to the cause of the accident. His answer was tantamount to saying: "In my opinion the woman stepped from the car while it was in motion." The next question on the paper, which he failed to answer, was: "Give a full account of the accident as witnessed by you," etc. Furthermore, on the stand he testified that he did not remember seeing the woman get off the car. This further bears out the conclusion that in his answer to the question as to his opinion he was merely giving his opinion and not stating as a fact that she had stepped off the car while it was in motion.

Furthermore, we are of the opinion that this paper, which could be treated in no other light than as a memorandum made by the witness not at the time of the accident but the next day, could be used only for the purpose of refreshing his recollection or memory, if it could be used for that purpose, which is doubtful in view of the fact that it was not made until the next day. There are authorities, and some of them are cited by counsel for plaintiff in error in their brief, which

hold, that, while a court will not receive as evidence a memorandum which has served to refresh the recollection of a witness, yet, where after reading it a witness testifies that he has no recollection of the facts therein stated but that the memorandum was made by him at a time when the events recited were fresh in his recollection and is correct, such memorandum is admissible. An examination of these authorities will disclose that these are cases of book accounts, or transactions kept in the usual course of business and required to be kept in the course of business by the person making the memorandum or entries. But where the memorandum is prepared or made by the witness *at the instance of an interested party, as in this case it was*, the court will not admit the memorandum in evidence or allow it to be used by the witness to refresh his recollection. 5 Jones on Evidence, Section 879, and 1 Wharton on Evidence (3 ed.), Section 523.

Where, however, the witness's memory of the event is extinguished, and the memorandum is offered as substantive evidence, he testifying to it as correct, but recollecting nothing as to its contents, then it is inadmissible unless it is shown to be virtually coincident with the event. This is eminently the case when the concoction is in view of litigation. *Steinkeller v. Newton*, 9 Car. & P., 313, 315; *Washington Ice Co. v. Webster*, 68 Me., 449, 470; *Church v. Perkins*, 3 T. R., 749, 752, and Wigmore on Evidence, Sections 763, 902-905 (pp. 127, 139, Pocket Ed.)

In the case of *Steinkeller v. Newton*, *supra*, the witness 18 months before the trial drew up a pa-

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per at the request of the party calling him, and the court would not even permit him to refer to it to refresh his recollection, much less admit it in evidence.

We do not believe that any well-considered case can be found in which a paper such as this, prepared as this was prepared, at the request of a party to the suit, after the accident had occurred and not contemporaneous therewith, has been held admissible. We doubt the propriety of allowing the witness to use it to refresh his recollection, because of the manner in which it was procured — at the request of a party to the suit. However, we do not hold that it was not proper to use it to refresh the recollection of the witness, as it is not necessary to so hold; but we do hold that no error was committed by the court in excluding it as substantive evidence.

There being no other prejudicial error claimed to exist in the record, the judgment of the common pleas court is affirmed.

Judgment affirmed.

JONES, E. H., and JONES, OLIVER B., JJ., concur.

THE NASBY BUILDING CO. v. THE WALBRIDGE
BUILDING CO.

Landlord and tenant—Nonpayment of rent—Waiver of forfeiture by landlord—Asking judgment for accrued rents—And appointment of receiver—Foreclosure of mortgage—Statute of limitations—Inapplicable to defense of fraud, when.

1. Where a lease has been forfeited for nonpayment of rent, the lessor does not waive his right to enforce the forfeiture by filing a cross-petition setting up his claims under a mortgage, nor by demanding judgment for accrued rent, nor by procuring the appointment of a receiver in the foreclosure action, who collects the rents and holds them subject to the order of the court.
2. Statutes of limitation have no application to defenses not involving set-off or counterclaim.

(Decided June 19, 1916.)

ERROR: Court of Appeals for Lucas county.

Messrs. Howell, Roberts & Duncan and Messrs. Geer & Lane, for plaintiff in error.

Messrs. Tracy, Chapman & Welles, for defendant in error.

RICHARDS, J. In the court of common pleas The Equitable Life Assurance Society commenced an action for the foreclosure of a mortgage of \$137,000 executed by The Walbridge Building Company. Among the defendants was a corporation known as The Nasby Building Company, which latter company had become the lessee of the premises involved, known as The Nasby Building in the City of Toledo, for a period of 99 years from the 1st day of January, 1909. The

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Nasby Bldg. Co. v. Walbridge Bldg. Co.

Walbridge Building Company filed a cross-petition setting up, among other things, that the lessee, The Nasby Building Company, had obligated itself to make the payments provided for in the mortgage already mentioned, and in addition had agreed by an unsecured obligation to pay to The Walbridge Building Company the sum of \$13,000, and had agreed to pay also, in installments, certain rent for the premises. The Walbridge Building Company further averred that The Nasby Building Company was in default on making sundry of these payments upon the mortgage and on the rent, and was also in default in failing to make the payment of the \$13,000 indebtedness. A receiver was appointed in the court of common pleas, who took charge of and has been collecting the rent on the premises. Thereafter The Walbridge Building Company filed an amended and supplemental cross-petition making many of the same averments contained in its original cross-petition, and in addition thereto certain other averments showing that it was entitled to the possession of the premises in controversy, and praying that the lease and all the rights and interest of The Nasby Building Company under the same be declared forfeited, and possession awarded to the cross-petitioner. To this last pleading The Nasby Building Company filed an answer admitting substantially all of the material averments contained in the amended and supplemental cross-petition, and denying other averments, and concluded its pleading by allegations of fraudulent representations on the part of The Walbridge Building Company, which

induced The Nasby Building Company to enter into the lease made in December, 1908. The Nasby Building Company avers that by reason of these fraudulent representations it has been damaged in the sum of \$135,000 for which amount it asks a finding and judgment against The Walbridge Building Company.

Numerous motions and demurrers were made and disposed of in the court of common pleas, and thereupon The Walbridge Building Company moved for judgment in its favor against The Nasby Building Company upon the pleadings, which motion was, on consideration, granted by the trial court and a judgment rendered excluding The Nasby Building Company from the possession of the real estate in controversy and awarding the same to The Walbridge Building Company "free and clear of any and all claims of said, The Nasby Building Company, on account of any of the matters and things set forth in the pleadings heretofore filed herein." To this judgment The Nasby Building Company prosecutes error.

It is insisted that the judgment of the trial court is wrong for the reason that The Walbridge Building Company having in its original cross-petition elected to demand payment of the rent which had accrued, and having procured the appointment of a receiver who had taken possession of the property, had thereby waived the right to insist on a forfeiture of the lease and to recover possession of the premises by reason of default in making the payments stipulated therein. We can not accede to this contention. This branch of the case is within the principles announced by Judge

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Hoadly in the case of *Campbell v. McElevey et al.*, 2 Disney, 574, and does not fall within the terms of *Owens et al. v. Hickman et al.*, 2 Disney, 471. The receiver is simply collecting the rent and holding the same subject to the order of the court.

Counsel further insist that the cross-petitioner is not entitled to recover the premises because of failure to make demand and give proper notice to justify a forfeiture of the lease. It is a sufficient answer to this contention that the lease itself waives these requirements, and those provisions we hold to be valid.

The most important question in this case is the one raised as to the application of the statute of limitations to the contention made by The Nasby Building Company, that the lease was induced by means of fraudulent representations of The Walbridge Building Company. Those representations, whatever they were, appear to have been made in December, 1908. The petition for the foreclosure of the mortgage in this case was filed in April, 1915, and the amended and supplemental cross-petition of The Walbridge Building Company was filed on August 21, 1915. The Walbridge Building Company by reply sets up the statute of limitations of four years, and insists that any claim made on account of fraudulent representations is barred by that statute. The court of common pleas sustained this contention and for that reason entered the judgment already stated. It will be noted from the pleading filed by The Nasby Building Company that it does not ask for the cancellation or rescission of the lease by reason of the claimed fraudulent representations, but

asks only for damages resulting to it by reason of such claimed fraud. The principle of law that defenses are held not to be barred by the statute of limitations is one which is well established by the authorities and is founded on reason. The rule is succinctly stated in 17 R. C. L., 745, and in 25 Cyc., 1063, and is applied in *Hart v. Church*, 126 Cal., 471; *Butler v. Carpenter*, 163 Mo., 597; *Williamson v. Brown*, 195 Mo., 313, and in *Pinkham v. Pinkham et al.*, 60 Neb., 600, 611. Manifestly the purpose of the statute of limitations is, as has been well said, to bar actions and not to suppress or deny matters of defense whether equitable or legal.

The lease provides not only for the payment of rent, but contains appropriate provisions for the payment of the mortgage indebtedness held by The Equitable Life Assurance Society, and the allegations of the pleadings show that the defendant, The Nasby Building Company, violated its obligation in that regard as well as its obligation to pay the rent and the unsecured indebtedness of \$13,000 to The Walbridge Building Company.

In view of the fact that The Nasby Building Company does not claim a rescission or cancellation of the lease on account of the alleged fraud, but seeks only to recoup damages by reason thereof, if the judgment in the court of common pleas had proceeded only to the extent of adjudging that The Walbridge Building Company was entitled to the possession of the premises it would be free from prejudicial error; but it goes much farther than simply to adjudge the possession of the premises of that company, and decides that

that company shall hold the premises free and clear of all claims of The Nasby Building Company on account of the matters averred in the pleadings. We have already seen that as to some of these claims the claim for damages set up by The Nasby Building Company is purely defensive, and is not barred by the statute of limitations.

The judgment will be reversed and the cause remanded for further proceedings according to law.

Judgment reversed, and cause remanded.

CHITTENDEN and KINKADE, JJ., concur.

THE CINCINNATI ICE CO. ET AL. v. THE CITY
OF CINCINNATI ET AL.

*Injunction—Special assessments—Degree of proof to warrant
injunction—Market value before and after improvement.*

A special assessment will not be enjoined on the ground that the benefits are not equal to the assessment unless it is clearly and convincingly shown, nor will the question of market value before and after the improvement alone be considered.

(Decided December 6, 1915.)

APPEAL: Court of Appeals for Hamilton county.

Mr. Geo. J. Slaline and Mr. John J. Acomb, for plaintiffs.

Mr. Walter M. Schoenle, city solicitor, and Mr. Frank K. Bowman, assistant city solicitor, for defendants.

JONES, OLIVER B., J. This is an action to contest the validity of an assessment for the improvement of Livingston street, by paving with granite, heard on appeal from the court of insolvency.

While the petition contains allegations of irregularity in the proceedings of council, no attempt was made to support them by any evidence. The only evidence offered by plaintiffs was for the purpose of showing that the assessment was in excess of the benefits. Testimony was submitted by plaintiffs to show that the market value after the completion of the improvement was no greater than it had been before. Defendants, however, produced testimony showing that the market value of plaintiffs' respective lots directly after the improvement exceeded their value immediately before the improvement by a sum largely in excess of the amount of the assessment.

The street had been improved by bowldering in 1867 and 1872. There had been no subsequent improvement until the one in question, and the pavement and curbs were out of repair and in bad condition. The evidence showed that the real estate in that locality had suffered a general deterioration in value. So, even if the evidence of plaintiffs were taken to the exclusion of that of defendants, it might still be possible that a considerable benefit had been conferred upon the abutting lots by this improvement, even though the market value had remained the same.

It is true that the foundation for the support of a special assessment is the special benefit conferred by the improvement, and that such assessment can in no case exceed such benefit. *Cham-*

berlain v. City of Cleveland, 34 Ohio St., 551; *Walsh v. Barron, Treas.*, 61 Ohio St., 15, and *Walsh v. Sims, Treas.*, 65 Ohio St., 211.

But an assessment will not be enjoined on the ground that the benefits are not equal to the assessment, unless it is clearly and convincingly shown. Nor will the question of market value before and after the improvement alone be considered. *McMaken v. Hayes et al.*, 10 C. C., N. S., 38, and *Prentice v. City of Toledo*, 11 C. C., N. S., 299.

In this case the evidence fails to convince the court that the assessments are in any instance in excess of the benefits conferred by the improvement, and the petition will therefore be dismissed at plaintiffs' costs.

Petition dismissed.

JONES, E. H., P. J., and GORMAN, J., concur.

THE CINCINNATI TRACTION CO. v. FRANK, BY ETC.

Negligence—Suddenly starting street car—Company guilty of negligence, when—Instruction to jury—Total lack of evidence of material fact—Appendicitis result of injury.

1. If a street car stops and a passenger is attempting to alight from the car, and while in the act of alighting the agent of the company in charge of the car suddenly puts it in motion without giving the passenger sufficient time to alight, and by reason of such starting of the car the passenger is injured, then the company is guilty of negligence.
2. While it is the duty of the court to inform the jury, if requested, when there is no evidence of a material fact, nevertheless, the slightest evidence, from which the jury may properly infer the fact, is enough to preclude such an instruction.

(Decided June 21, 1915.)

ERROR: Court of Appeals for Hamilton county.

Mr. Joseph Wilby and Mr. James G. Stewart,
for plaintiff in error.

Messrs. Galvin & Bauer, for defendant in error.

GORMAN, J. William Frank, a minor about 17 years of age, brought an action through his father as next friend, in the common pleas court of Hamilton county, to recover damages from the plaintiff in error for injuries which he claimed to have sustained about December 7, 1909, as he was alighting from a street car on Harrison avenue near McLean avenue, in the city of Cincinnati. He claims in his petition that the car had come to a stop at a point on Harrison avenue, about a hundred feet west of Spring Grove avenue, and that

there was a crossover at this point where the east-bound car running on the south or eastbound track on Harrison avenue was to cross over to the north or westbound track on Harrison avenue because of some street repairs that were being made on McLean avenue. He claims that as he was alighting from the car after it had stopped and before he had an opportunity to do so in safety, the conductor gave the signal to the motorman to start the car; that the car started with a sudden jerk and threw him to the ground; that he was rendered sick and dizzy and nervous, and continued to be in that condition for a long time.

The evidence tends to show that the car upon which the boy was a passenger stopped at a point about 100 or 150 feet west of the intersection of Harrison and Spring Grove avenues, as claimed in the petition; that 8 or 10 persons alighted from the car; that the boy was the last one; and that while he was alighting from the car and before he had an opportunity to do so in safety, he was thrown to the ground and was injured. He claims that as a result of these injuries appendicitis developed, and that about four months from the date of the injuries an operation was performed by Dr. Paul to remove the appendix, which operation was successful.

The jury returned a verdict for \$1,200 in favor of plaintiff, and error is now prosecuted to reverse that judgment.

There are but two grounds of error presented in argument and in the brief of counsel for plaintiff in error.

It is claimed, first, that the court erred in its general charge to the jury on the question of the duty of the plaintiff in error with reference to the starting of the car. The court in substance charged the jury that if the car upon which William Frank was a passenger had stopped at the place alleged in the petition and in the proof, and he was attempting to alight from the car, and while in the act of alighting the agent of the defendant in charge of the car suddenly put it in motion, without giving him sufficient time to alight, and by reason of said starting of the car the plaintiff was caused the injury as alleged, then the defendant was guilty of negligence.

We think this charge is substantially correct, and follows the rule laid down by the supreme court in the case of *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St., 153. The first paragraph of the syllabus in that case is as follows:

"If a street car comes to a full stop for any purpose and a passenger is in the act of alighting, it is negligence for the conductor to start the car before such passenger has had a reasonable opportunity to get off safely."

The same language employed in this paragraph of the syllabus is used by Judge Davis in the opinion of the court on page 155.

The evidence in this case shows that several passengers got off at this point, and the boy, William Frank, testified that it was customary for the car to stop at this place while the crossover was laid in the street and the repairs were being made, and that the passengers usually got off at the point where he undertook to alight on this morning,

during the time when repairs on the street were being made. The boy came in on the Westwood cars every day to attend Hughes High School.

We think that the allegations as to the stopping of the car and the starting of the same, and the accident to the boy, were amply sustained by the proof, and that the court did not err in the general charge in the particular complained of by plaintiff in error.

The second ground of error urged by plaintiff in error is the refusal of the court to give a special charge requested, before argument, by counsel for the traction company, as follows:

"I charge you that there is no evidence in this case which you are entitled to consider, that the appendicitis of the plaintiff, for which he was operated on in April, 1910, was caused by or in any way connected with a fall of the plaintiff, if any, from the car of the defendant, in December, 1909, as testified to by the plaintiff; and the defendant is not responsible for such appendicitis of the plaintiff."

Counsel for plaintiff in error excepted to the refusal of the court to give this charge.

Upon an examination of the record we are of the opinion that there is evidence from which the jury might infer that the appendicitis of the boy, William Frank, resulted from the injury sustained at the time he was thrown from the car in December, 1909. The boy testified that the same day, and generally almost every day, after he was hurt as the result of this fall, up to the time when his appendix was removed, April, 1910, he suffered great and excruciating pains in his stomach

and the lower part of his abdomen and in his right side. His father and mother testified that he continually complained of the pain in the lower part of his body about the abdomen. Dr. Paul removed the appendix in April, 1910, about four months after the boy was injured. He said he saw no evidence of the appendix having been affected as a result of a traumatic injury, that there was no scar on the appendix, and that in his opinion appendicitis did not result from the traumatic injury. Upon cross-examination he did say that appendicitis could result from a blow or injury about the region of the appendix on the right side of the abdomen. Dr. Musekamp, who attended the boy, testified that appendicitis could, and did frequently, result from an injury or a blow or a fall. Dr. Webb, who made an examination of the boy after the operation, testified that he had never heard of a case of appendicitis resulting from a blow or an injury. Dr. Paul testified that manifestations of appendicitis frequently occurred in persons, continuing over a period of a year or two years, or longer, and that treatment for these manifestations consisted in applications of ice on the parts of the body adjacent to the appendix, and that frequently it was necessary to perform the operation of removing the appendix.

We think that the court would not have been warranted in charging the jury that there was no evidence from which they could infer that appendicitis in this boy resulted from this injury, and that it would have been error for the court to have given such a charge.

While it is the duty of the court to inform the jury, if requested, when there is no evidence of a material fact, nevertheless, the slightest evidence from which the jury may properly infer the fact is enough to preclude such an instruction. *Bond v. Warren*, 53 N. C., 191; *Kansas City, M. & B. Rd. Co. v. Burton*, 97 Ala., 240, Syl. 10; *Central Ry. Co. v. State*, 82 Md., 647; *Pomeroy v. B. & M. Rd. Co.*, 172 Mass., 92, and *Warren v. Halley*, 107 Mich., 120.

In *Bisewski v. Booth*, 100 Wis., 383, a charge similar to the one requested in this case was given, and the supreme court held that it was error to have given such a charge.

In the case of *Sullivan v. Boston Elevated Ry. Co.*, 185 Mass., 602, the plaintiff, Sullivan, recovered for injuries sustained by him while driving a wagon, from the seat of which he was thrown by a collision with a car of the Elevated Railway Company. He testified that before the accident his health was good, and he claimed that as a result of his injuries appendicitis followed. There was the evidence of an expert surgeon who testified that such a fall could be an adequate cause of appendicitis. The trial court was asked to charge the jury as follows:

"If the jury find that the plaintiff Sullivan is entitled to recover damages the jury are instructed that there is no sufficient evidence that the appendicitis from which the plaintiff suffered at a time subsequent to the accident was a result of the accident or that the accident in any way contributed to the existence of that disease or in any way affected it.

"If the jury find that the plaintiff Sullivan is entitled to recover they are instructed to disregard, in the assessment of damages, all the evidence introduced in the case in regard to appendicitis or the operation for appendicitis."

The trial court refused to give this charge and it was alleged that this refusal was error. The supreme court held that it was not error to thus refuse it, and on page 606, the court says:

"Dr. Bottomley's testimony warranted the jury in finding that the inflammation of the appendix was caused by the collision. He properly was found qualified to testify as an expert, and testified 'that such a fall as Sullivan testified to receiving could be an adequate cause of the appendicitis.' That was sufficient, taken in connection with the plaintiff's testimony that his health was good before the accident." Citing the cases, *McGarrahan v. New York, New Haven & Hartford Railroad*, 171 Mass., 211, and *Houston v. Traphagen*, 18 Vroom, 23.

In the case at bar, the boy, his father and his mother testified that he had had perfect health prior to his injuries; that he had never had a physician or the services of a physician; and that after the accident he lost weight, was nervous, complained of pains, and was obliged to be removed from school and could not finish his education in the high school. There was evidence tending to show that he was permanently injured.

We are not prepared to say that the evidence before the jury was not of such a character as to warrant the jury in inferring that the cause of the appendicitis was the injury sustained by this boy

when he was thrown from the car. Notwithstanding the fact that Dr. Paul testified that in his opinion this was not the cause of the appendicitis, it was proper to submit the question to the jury for their determination, and this was especially true in view of the fact that the mother of the boy testified that Dr. Paul had told her after the operation was performed that the appendicitis was the result of a bruise on the appendix. It is true that Dr. Paul denied that he had made such a statement, but this evidence was all proper to go to the jury to enable them to determine whether or not appendicitis was one of the results of the injury sustained by the boy.

The court in his charge to the jury did not allude to the question of appendicitis, but made a proper charge to the effect that if plaintiff was entitled to recover the jury was to take into consideration, in determining the amount of damages, the pain and suffering he had endured as the natural and probable consequences of the injury, the impairment of his health, and the question of whether or not he would be permanently injured after he attained his majority, twenty-one years. We think the charge was as full and fair as should have been asked by the plaintiff in error. It was certainly proper to allow evidence to be admitted as to the nature of the boy's injuries, the complaints he had made, the location and character of the pains he had endured, and the fact that an operation had been performed for appendicitis. We think there was a scintilla of evidence in the case from which the jury might reasonably infer that appendicitis was one of the consequences re-

sulting from this injury, and if that be true it would have been manifest error for the court to have given the special charge requested by the defendant below.

The amount of the verdict, \$1200, would not be excessive even if the question of appendicitis were not in the case at all. The boy suffered pain for four months before the operation was performed, and thereafter continued to be nervous and to suffer pain and loss of sleep.

Upon a review of the whole case we think that the verdict and judgment in this case represent substantial justice, and that no reasonable grounds exist for complaining of either the verdict or the judgment. The judgment, therefore, will be affirmed.

Judgment affirmed.

JONES, E. H., and JONES, OLIVER B., JJ., concur.

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Nussdorfer v. State, ex rel. Miller.

NUSSDORFER, AUDITOR, v. THE STATE, EX REL.
MILLER.

Elections—Compensation of deputy state supervisors—Primaries—Section 4990, General Code, construed—Pleading—Sufficiency of allegations—Funds available to pay claim.

1. In an action based on a claim against a county, the allegation that there is money in the hands of the county treasurer, to the credit of the proper fund and not otherwise appropriated, sufficient to satisfy the claim in suit, meets the requirement of the case without adding that it has been appropriated by the county commissioners for payment of the particular claim in question.
2. The compensation provided for deputy state supervisors of elections for the holding of primary elections is two dollars for each and every election precinct in the county for each and every primary election held under authority of law.

(Decided July 11, 1916.)

ERROR: Court of Appeals for Tuscarawas county.

Mr. Edward C. Turner, attorney general; *Mr. A. O. Dickey* and *Mr. E. E. Lindsay*, prosecuting attorney, for plaintiff in error.

Mr. J. C. Mitchell and *Messrs. Graham & Stafford*, for defendant in error.

HOUCK, J. The defendant in error was the relator in the court below, and the plaintiff in error was the respondent.

The record discloses that the action below was based on a petition in mandamus seeking to compel the county auditor of Tuscarawas county, Ohio, to issue his warrant on the county treasurer of said

county for the sum of \$148 in favor of Upsure D. Miller, the relator, one of the members of the deputy state supervisors of elections of said county, the said sum alleged to be due him being for service rendered in conducting the primary election held on the 25th day of April, 1910.

The plaintiff in error, respondent below, filed a general demurrer to said petition, which was heard by the trial judge and overruled, and, respondent not desiring to plead further, judgment was entered for the relator, granting to him all the relief prayed for in his petition, and directing that a peremptory writ of mandamus issue ordering and directing the said respondent, Robert H. Nussdorfer, as the county auditor of Tuscarawas county, Ohio, to issue his warrant on the county treasurer of said county for the sum of \$148 in favor of Upsure D. Miller, the relator.

To the overruling of the demurrer and the entering of the judgment in favor of said relator the plaintiff in error prosecutes error to this court, asking for a reversal of the judgment of the common pleas court.

Counsel for plaintiff in error urge a reversal of the judgment below upon two grounds:

1. That the following allegation in the petition is not sufficient in law:

“There is money in the county treasurer’s hands to the credit of the proper fund, and not otherwise appropriated, to pay the full amount of relator’s claim for compensation.”

2. That there is no provision of law authorizing the compensation claimed by the relator, or the payment of same from any source.

Coming now to the first ground of alleged error, the plaintiff in error contends that the language in the petition is not sufficient in law to impose upon the county auditor the duty to issue a warrant on the county treasurer; that it cannot be properly claimed that it is the duty of the county auditor to issue a warrant to pay money out of the county funds, unless it affirmatively appears by allegations in the petition that there is money in the treasury to the credit of the fund from which the claim is payable and that it has been appropriated by the county commissioners for the payment of the particular claim in question.

We cannot agree with learned counsel as to their contention in this respect. From our examination of the language used we feel that the allegation in the petition, "that there is money in the county treasurer's hands to the credit of the proper fund, and not otherwise appropriated," etc., is sufficient. All that is required in this regard is that the petition should affirmatively show that the money necessary to pay the claim is in the county treasury, and that it is available for the purpose for which it is sought to be used.

As to the second ground of alleged error, the plaintiff in error insists that deputy state supervisors of elections are to be paid a compensation of \$2 for each election precinct in the county, for their services in conducting all primary elections held during any one year, and the defendant in error as strongly insists that they are to be paid \$2 for each election precinct in the county in conducting each and every primary election required or authorized by law to be held in such county.

The parties to this suit, in support of their respective claims, rely upon the provisions of Section 4990, General Code, which is as follows:

"For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections."

The real question presented for our determination is, What is the proper and correct interpretation and construction to be placed on said Section 4990, General Code?

It is the duty of courts in construing a statute to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way. But, first of all, this should be sought in the words and language used; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the statute, there is no occasion to resort to other means of interpretation. In other words, the statute itself, the words and sentences contained therein, furnishes the very best means for its own interpretation. If the sense in which the words are intended to be used can be clearly ascertained, the intention thus indicated will and must prevail.

We think there can be no doubt that the primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the

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language that he has incorporated in the statute. He is presumed to know the meaning of words and the rules of grammar; and courts have no function of legislation, but must construe and interpret a statute by means of the words and sentences contained therein.

Counsel for plaintiff in error maintain that the construction of Section 4990, General Code, which must be adopted in this case, is that deputy state supervisors of elections are entitled to an annual salary of \$2 for each voting precinct in the county for conducting primary elections, and it is not changed in amount by reason of more than one primary election being held.

We cannot conceive how counsel arrive at such a construction. They are assuming that the statute provides for an annual compensation, which it does not.

It is conceded that whatever compensation, if any, deputy state supervisors of elections are to receive for the holding of primary elections is provided for under Section 4990, General Code. We feel that it would be just as reasonable for counsel to claim, under the language used in this section, that the compensation they now concede for one year should be compensation for two years; because the statute, so far as language is concerned, is silent as to whether or not this compensation shall be for one, two, or three years. And we certainly have no right to read into a statute, for the purpose of construction, any language that is not contained therein.

It seems clear to us that if the legislature had intended that the compensation provided in Section

4990 was to be for all primary elections held within the year, it would have inserted therein the same or similar language as that used in Section 4822, General Code, to-wit, "during any year."

Again, it will be observed from a careful examination of the language used in the statute before us for construction that the lawmakers had in mind, as the basis for fixing the compensation to be allowed for services rendered by deputy state supervisors of elections in conducting primary elections, the number of voting precincts in the county, and that the compensation was fixed at \$2 for each precinct and was so fixed without any reference to time. Therefore, in view of these facts, and giving to the language used its plain and simple meaning, we hold that it was intended by the legislature that deputy state supervisors of elections when holding primary elections should be paid \$2 for each election precinct for each and every primary election held under authority of law.

The section of the General Code under consideration is not as clear and explicit as it might be, but we are to construe the language therein so as to give to the words therein their ordinary and popular meaning, thereby affording a sensible and intelligent construction to every part of the same and avoiding absurd and unjust consequences; and, if possible, so as to make it valid and effective, thus carrying out the intention of the legislature.

When the legislature, within powers given it by our constitution, has enacted a statute, and fixed the rights of the people thereunder, it is not within the province of a court to declare a different policy or attach different rights. In this matter the law-

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making body is supreme, and it is presumed that it will pass no unjust or unwise laws. If the statute under consideration is unwise, unjust, or does not meet with popular approval, the remedy is with the people and the legislature, and not with the courts.

It therefore follows from what we have already said that we are of the opinion that the judgment of the common pleas court is right, and should be affirmed.

Judgment affirmed.

SHIELDS and POWELL, JJ., concur.

THE BALTIMORE & OHIO SOUTHWESTERN RAIL-
ROAD CO. v. WUEST ET AL.

Warehouseman—Ordinary care—Act of God—Warehouseman liable for damage done by act of God, when—Warehouseman excused for failure to exercise ordinary care, when.

1. A warehouseman is liable for damage done by an unprecedented flood to goods stored in his warehouse where his own negligence commingling with the act of God as an active and co-operative element resulted in damage to the goods.
2. A negligent warehouseman can be excused for failure to exercise ordinary care only in cases where the superior force of the act of God would have produced the same damage whether the warehouseman had been negligent or not.

(Decided December 28, 1915.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Harmon, Colston, Goldsmith & Hoadly,
for plaintiff in error.

Mr. Frank J. Dorger and Mr. Robert S. Alcorn,
for defendants in error.

JONES, E. H., J. This action was brought in the superior court of Cincinnati by the defendants in error, Mary and Adam Wuest, doing business as Adam Wuest, against The Baltimore & Ohio Southwestern Railroad Company, to recover damages sustained during the flood of March, 1913, by plaintiffs below on bales of cotton and linters stored at the storage warehouse of the railroad company at the southwest corner of Front and Mill streets in the city of Cincinnati.

The railroad company, as a part of its business, had three different warehouses in Cincinnati, where it did a storage business for the benefit of the public desiring such accommodations. One was a large, five-story, brick warehouse, extending from the west side of Smith street westwardly to Mill street. In addition to this large warehouse for the storage of general merchandise, the railroad company had a one-story frame building on the southwest corner of Second and Mill streets, and one on the east side of Mill street. The plaintiffs had stored, at the time of the flood, 324 bales of cotton and linters, all but a small portion of which were stored in what was known as the old Southern Railway building on the southwest corner of Mill and Second streets. A few of the bales were stored in what was called the Fruit House, on the opposite corner. The plaintiffs had been

storing cotton in those warehouses for seven or eight years prior to the flood of March, 1913.

Defendant claimed that the damage to plaintiffs' cotton was due to the flood of March, 1913, and was the result of an act of God. The defendant further claimed that in the exercise of ordinary care, in view of all the circumstances and conditions, it did all that could be reasonably expected of it for the protection of the cotton, and that it is therefore not responsible for the damage sustained by plaintiffs on account of said flood.

The trial resulted in a verdict in favor of the plaintiffs below for \$3,631.50, and to reverse the judgment upon this verdict this proceeding in error is prosecuted. The last paragraph of the statement above made accurately states the respective claims of the parties in this case, and tersely states the issue which the jury was called upon to decide, which issue is exclusively one of fact for the jury.

The judgment of the court below, based as it is upon the verdict of the jury, cannot be disturbed by this reviewing court unless it is found that there was some prejudicial error either in the admission or rejection of evidence or in the charge of the court. Recognizing this situation, counsel for plaintiff in error rely for a reversal of this judgment upon alleged errors of the trial judge in the general charge and in the refusal to give certain special charges requested by them, together with the giving of certain special charges requested by plaintiffs below.

The examination of the bill of exceptions, with a view to ascertaining the action of the court in giving the law of the case to the jury, shows that

counsel for plaintiff in error in their carefully-prepared brief have made complaints of error which are not borne out by the bill of exceptions. For example, we quote from page 36 of said brief as follows:

"The essential and important fact in this case was that the damage to plaintiffs' property was caused by 'an act of God', to-wit, the flood in the Ohio River, and that being the case the defendant's negligence, if there were any, which we deny and will discuss at a later stage of this brief, did not make the defendant liable for the damage to plaintiffs' property."

Continuing, on page 37, counsel quote from the opinion of our supreme court, in *Assur v. The City of Cincinnati et al.*, 88 Ohio St., 181, at page 187, language which they construe as a finding of that court to the effect that the flood of 1913 throughout the state of Ohio was "an act of God," and counsel then say, on page 37 of the brief:

"If this court does not know already that the flood of 1913 was 'an act of God,' certainly the decision of the Supreme Court that it was, is binding upon and will govern this court."

One would think from reading this portion of the brief that there was some ground of complaint against the charge upon this subject, but upon examination of the charge we find that the court, upon page 383 of the bill of exceptions, used this language in its charge to the jury:

"The flood of March, 1913, in some of its aspects may properly be considered by you as such an act of God."

From a reading of the entire brief, however, it fairly appears that the thing complained of by counsel in this connection is that the court refused to charge that the damage to the cotton was an "act of God." Such a charge would have been erroneous under the evidence in this case, pages of the record being devoted to testimony adduced by plaintiffs tending to show that notwithstanding the unusual and almost unprecedented flood in the Ohio river, the railroad company, as the custodian of these goods, had ample time and opportunity to protect them from the ravages of the flood and to remove them to a place of safety. It was shown that after warnings had been received through the weather bureau, and other sources, of an unexpected rise in the Ohio river, 409 tons of freight had been received and stored by the company through its regular employes in the large warehouse near by. The purpose of this and other evidence was to place fully before the jury the facts and conditions existing, in order that it might be determined whether or not the claim of the railroad company, that it did all that could reasonably be expected of it for the protection of the cotton, in view of all the circumstances and conditions, was true. All this evidence so offered was relevant and material under the law, as well stated in the case of *Backus & Sons v. Start et al.*, 13 Fed. Rep., 69, the syllabus of which reads:

"3. Warehousemen are not required to provide against an unprecedented emergency; but if they have reason to expect such an emergency, they are bound to take such precautionary measures to prevent loss as prudent and skillful men in the like

business and under like circumstances might be expected to use.

"4. They are not bound to have or keep on hand special facilities to meet and overcome possible but unexpected and unprecedented emergencies, which are included in what is called the 'act of God;' but if imminent danger presents itself, to use such appliances and means as the ordinary and safe conduct of their business requires them to possess, and such as are at hand, and to use them with such promptness as would be expected of ordinarily careful and prudent men in regard to their own, or property entrusted to their care under like circumstances."

Section 8459, General Code, thus defines in part the duties of a warehouseman:

"A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not:

"1. Be contrary to the provisions of this chapter.

"2. In any wise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own."

And in *H. A. Johnson & Co. v. Springfield Ice & Refrigerating Co.*, 143 Mo. App., 441, it is held:

"A warehouseman cannot escape liability for damage from an unprecedented flood to goods stored in his warehouse where it appears that his own negligence, commingling with the act of God as an active and co-operative element, resulted in

damages to the goods. The warehouseman would be excused for failure to exercise ordinary care only in cases where the superior force of the act of God would have produced the same damage whether the warehouseman had been negligent or not."

From *Memphis & Charleston Rd. Co. v. Reeves*, 10 Wall., 176, 179, we quote the following language from the charge of the trial court in that case, which was held by the reviewing court to be a correct charge:

"When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

These excerpts correctly state what we conceive to be the law applicable to this case. We now quote from the charge of the trial court in the instant case, at pages 383-4-5 of the bill of exceptions:

"An extraordinary flood of such volume and height and coming with such rapidity as to be almost if not quite unprecedented, is sometimes referred to as an act of God. By this term is meant an occurrence directly and entirely due to natural causes operating without human intervention and such that because of its magnitude or the suddenness of its coming, it could not have been foreseen in the light of ordinary knowledge.

"The flood of March, 1913, in some of its aspects may properly be considered by you as such an act of God.

"The question, however, in this case remains for your determination, whether the defendant under the circumstances existing for the period shortly prior to the stage of flood which reached plaintiffs' goods, and with the knowledge of conditions, which defendant had or should have had at that time, exercised ordinary care for these goods stored in the so-called fruit house and old southern depot warehouses.

"If the defendant had or should have had knowledge of, or reasonable ground to anticipate a stage of water in excess of sixty-two feet, at about which height plaintiffs' cotton was originally stored, and after such knowledge was had or should have been had, failed to use facilities reasonably available and such as would have been employed by ordinary prudence to protect the cotton from such stage of flood as was reasonably to have been anticipated, then defendant was negligent. Defendant, however, was not bound to keep on hand and immediately available facilities to meet an emergency not reasonably to have been anticipated, but only to take such precautionary measures to prevent loss as prudent and skillful men in a like business and under like circumstances would ordinarily take.

"The standard of ordinary care is in law an unvarying standard, but manifestly that action or inaction which will amount to ordinary care depends on the fact and circumstances of each particular case. Ordinary care is a course of ordi-

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nary prudence, commensurate with the danger reasonably to be anticipated.

"Accordingly, if you should find that at the time in question the defendant was wanting in the duty of care incumbent upon it with respect to plaintiff's goods, the defendant would not be excused by the mere fact of the occurrence at that time of an act of God, manifested in the flood. In such event you must determine further whether such negligence on the part of the defendant if the defendant was negligent, or such act of God or other cause was the operative or proximate cause of the damage. If defendant was negligent and such negligence operated proximately and directly to cause damage to plaintiff's cotton, the defendant is responsible for such damage.

"If, however, you should find that the flood in the extent, rate of increase and height was such as was not reasonably to have been anticipated by defendant in time to provide against damage to plaintiffs' goods by measures of ordinary prudence in view of facilities reasonably accessible, and if as the flood increased the defendant took such precautions as were called for by ordinary prudence, then the damage which actually resulted is chargeable to what has been termed an act of God and not to negligence on the part of defendant and defendant cannot be held to answer therefor."

This, we think, is a clear and complete statement of the law considered both as an abstract proposition and as touching the issues in this case.

There were a great many special charges requested by each of the parties in the trial below, and most of the argument of counsel for plaintiff

in error, both orally and by brief, was addressed to alleged errors of the court in ruling upon these special requests. We have found that the rulings of the learned judge upon each and all of these requests were consistent with the correct view of the law entertained by him and as expressed to the jury in the portion of the general charge above set out.

As before stated, it was the contention of counsel for plaintiff in error, both in this court and in the court below, that under the evidence in this case a verdict should have been instructed for the defendant at the close of all the evidence, on the theory that the flood in the Ohio river in the year 1913, which caused this damage, was an "act of God." We have already made clear our views that such an act on the part of the trial court would have been erroneous and wholly unjustified by the facts in this case. Cases are cited in which it has been held by eminent authorities that the evidence not only justified but required such action by the trial court. Other actions for damages by flood have been cited where the judgments of the *nisi prius* courts have been reversed for the refusal of the trial judge to charge that the damage caused by the flood was an "act of God." Some of these cases grew out of the great flood at Kansas City on May 31, 1903. The damage at that time and place was caused by joint floods in the Missouri and Kaw rivers, which unite at or near Kansas City. The weather reports predicted the rise in the Missouri river, but the rise in the Kaw river was not only wholly unexpected but was unprecedented. The weather bureau had received no

advices as to the water in the Kaw river. There was nothing in the telegraphic reports to indicate an unprecedented volume of water in the Missouri river.

In *Wertheimer, Swartz Shoe Co. v. Missouri Pac. Ry. Co.*, 147 Mo. App., 489, 126 S. W. Rep., 793, which is one of these flood cases, the court in its opinion, describing this flood, says at page 494:

"This rise had been gradual for several days and was due to heavy rains over the States of Missouri and Kansas having swollen the Missouri and Kansas rivers. But similar overflows had occurred before in the river bottom at Kansas City without damaging property, and similar warnings had been given by the weather office. On May 31st an overwhelming flood occurred there in consequence of a vast volume of water pouring from the Kaw river in a torrent strong enough to turn back the current of the Missouri river and cause that stream to flow for a few miles towards its source. This flood was unexpected even by the official in charge of the government weather office in Kansas City, as he testified. The witness said he had sent out bulletins and warnings to railroad companies and others from day to day as the waters rose, giving notice of danger, but the flood stage of thirty-five feet was unexpected."

The court held in that case "that the loss was due to the flood, and not to the railroad's failure to remove the goods to a place of safety."

Another case cited, where it was held as a matter of law that the flood damage was caused by an "act of God," was *Herritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, 139 Mo. App., 149,

122 S. W. Rep., 322. This action arose out of the same Kansas City flood, and the court found that the flood on May 30 and 31, 1903, at the junction of the Kaw and Missouri rivers, Kansas City, Missouri, was an "act of God," and that a carrier was not liable for loss of freight by such flood. And in its opinion the court said, at page 152:

"Plaintiff's entire case turns on a mere question of fact: that is, did defendant know or could it have known of the coming flood? * * * The Kaw suddenly rose, at Topeka and above, — miles from Kansas City, in addition to its already overflowed banks, and much stress is put upon the knowledge which defendant's officers had obtained by telegraph of the coming of these waters. But it was shown that the amount of rise which these additional waters would have caused at Kansas City would have left plaintiff's butter unharmed in the position in which defendant had placed it. The cause of the great destruction and the overwhelming nature of the flood arose, in great part, from the unexpected volume of water added to the already flooded Missouri. The result of the floods of both rivers joining at Kansas City caused the great destruction of property which that catastrophe brought about in such short time that few escaped its fury."

We cite only these two cases to show that where courts have decided as a matter of law that flood damage was an "act of God," the uncontroverted facts would admit of no other conclusion.

Such is not true in this case, the facts of which differ very materially from those just narrated from the Kansas City case. This flood was neither

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unprecedented nor unexpected. The evidence does show, we think, that some two or three days after the first warnings were received by the railroad company and others the rise was very rapid, — unexpectedly so, — but the evidence also shows that during all this time the railroad company, the warehouseman, in this case, was anticipating danger to the storage-shed and its contents and was directing its efforts along the line of preparing for the expected flood, although what was done did not inure in any way to the benefit of Mr. Wuest in saving his cotton. The case presented to us is not similar in a legal aspect to the cases growing out of the Kansas City flood.

The flood which reached this cotton and linters and caused this damage was neither unexpected nor unprecedented. The damage was caused many hours after repeated warnings had been given by the weather bureau and had been brought to the knowledge of the railroad company. Such being the case, the question as to whether the railroad company, in the exercise of ordinary care, did all that could be reasonably expected of it for the protection of the cotton, was one for the jury. This question was submitted to the jury under a clear and correct charge by the court.

Finding no errors in the proceedings of the court below, its judgment will be affirmed.

Judgment affirmed.

JONES, OLIVER B., and GORMAN, JJ., concur.

GROSS v. CLAUSS.

Lease—Provision for renewal or extension—Effect of holding over by lessee—Express notice of desire for further term not necessary, when.

1. A lease for a term with a privilege or option in the tenant of a renewal or extension for a further term, upon the same terms and conditions, is a present demise as to the renewal to begin at a future time, and under such covenant no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term.
2. A lease contained a provision that if the lessee should have performed all the conditions of the lease then upon its expiration the lessee should have the privilege of renewing the same for a four-year term upon the terms and conditions of the original lease. Upon the expiration of the original term the lessee remained in possession of the premises without anything being said or done by either of the parties with reference to a new lease, no notice being given by the lessee of his intention to exercise his option or privilege of a renewal. Lessee continued to occupy the premises and pay the rent for three months after the expiration of the original term. *Held:* That the lessee by continuing in possession of the premises and paying the stipulated rent without notifying the lessor of his intention not to make his election to renew, thereby bound himself for the term of four years from the date of the expiration of the original lease.

(Decided June 1, 1915.)

ERROR: Court of Appeals for Hamilton county.

Mr. E. A. Hafner and Mr. Walter C. Muhlhäuser, for plaintiff in error.

Mr. W. A. Rinckhoff, for defendant in error.

GORMAN, J. This is a proceeding in error to reverse a judgment of the municipal court of Cin-

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cinnati, in favor of defendant in error. The action below was one to recover \$125 rent claimed to be due under a lease between defendant in error, Elizabeth Clauss, the lessor, and plaintiff in error, George P. Gross, lessee.

The lease was in the usual form, containing the usual covenants, and was duly signed, attested, acknowledged and recorded. The term was for one year from October 1, 1911, at a yearly rental of \$300, payable in monthly installments of \$25 in advance. There is the following proviso in the lease: "provided that if the said lessee shall have performed all the conditions of this lease, that said lessee shall have the privilege of renewing the said lease for the term of four years from Oct. 1, 1912, upon the same terms and conditions herein set forth."

Upon the expiration of the term of one year the lessee, Gross, remained in possession of the premises without anything being said or done by either of the parties with reference to a new lease, and no notice being given by the lessee of his intention to exercise his option or privilege of a renewal. Lessee continued to occupy the premises thereafter, and to pay the \$25 rent each month, down to December 31, 1912, three months after the expiration of the original term. On December 31, 1912, he notified the lessor of his intention to relinquish the premises and remove therefrom, but he continued to pay the rent monthly down to September 1, 1913, although he had vacated on December 31, 1912. The premises continued vacant thereafter down to February 1, 1914. The action was for the recovery of the rent for the five months,

September, October, November and December, 1913, and January, 1914, upon the claim of the lessor, Mrs. Clauss, that by holding over his term, and nothing being said as to a renewal, the lessee thereby made his election to take the premises under his privilege of renewal for the further term of four years. The court below held with the defendant in error in her contention, and found that by holding over his term under the circumstances shown the lessee became bound for the additional four years. In this holding we are of the opinion that the court below committed no error.

We are of the opinion that the lessee, Gross, by continuing in possession of the premises and paying the stipulated rent, without notifying the lessor of his intention not to make his election to renew, thereby bound himself for the term of four years from October 1, 1912. See *Foster et al. v. Ellison*, 12 C. C., N. S., 399, where the court says on page 400, in speaking of the effect of holding over under a lease containing a provision for a renewal similar to the one under consideration:

"The term under the lease is for three and a half years, renewable forever, without any express notice required of the intention of lessee to renew. He held over the term of three and one-half years for a period of twenty days before notice to quit the premises [by the landlord] was served upon him, and thereby elected to renew."

In 1 Taylor on Landlord and Tenant (9 ed.), Section 332, at page 407, the author says:

"And where no notice is stipulated for, the tenant's mere continuance in possession and paying

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rent, without express notice of his desire for the further term, entitles and binds him thereto." Citing numerous cases.

In Jones on Landlord and Tenant, Section 338, the author discusses the question of whether or not a new lease is necessary under a privilege of renewal or whether at the option of the lessee it is extended by force of the covenant itself and becomes in effect a lease for the additional term. He states that there is a conflict of authorities on this point, New Hampshire, Massachusetts, Missouri and Maine holding that the election is exercised, where no notice is required, by the tenant remaining in possession and paying the rent. See *Ranlet v. Cook*, 44 N. H., 512; *Hall v. Spaulding*, 42 N. H., 259; *Ferguson v. Jackson*, 180 Mass., 557, and *Insurance & Law Bldg. Co. v. National Bank*, 5 Mo. App., 333, affirmed 71 Mo., 58.

The author further states that there are authorities holding that the word "renew" and "extend" should be construed to mean that a new lease should be executed, citing *Kollock v. Scribner*, 98 Wis., 104, and *Orton v. Noonan*, 27 Wis., 272.

We think that the best considered authorities hold that a lease for a term with a privilege or option in the tenant of a renewal or extension for a further term upon the same terms and conditions is a present demise as to the renewal to begin at a future time, and under such leases no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term.

It is true that some authorities make a distinction between a privilege of "renewal" and a privilege of "extension," but for all practical purposes, and to the mind of an ordinary person, a privilege of "renewal" and a privilege of "extension" vest in the lessee the same right, a right that adheres to the land and a covenant that runs with it.

The case of *Stevenson v. Alms*, 9 W. L. B., 17, is cited as an authority by counsel for plaintiff in error, to the effect that a tenant holding over under a lease similar to the one in the case at bar is not bound for the additional term. An examination of the facts in that case discloses that the tenant before the expiration of his term notified the lessor of his intention not to avail himself of his privilege and that he intended to vacate at the end of his term, and it was known to the lessor that the tenant had made arrangements to vacate and take other premises in the vicinity; so that it could not be held, as a matter of law, that by holding over in that case the lessee had impliedly elected to renew the lease.

In the case at bar the tenant, by continuing for three months in the premises, paying the rent under the lease and not notifying the lessor of his intention to surrender the premises and relinquish his privilege of a renewal, must be held to have thereby impliedly made his election to avail himself of his privilege of renewal, and to have thereby bound himself, and also the lessor, for the additional term. The rent not having been paid for the five months, and having accrued under the renewed term of the lease, the lessee became liable

therefor, and the judgment was properly entered against him.

Judgment affirmed.

JONES, E. H., and JONES, OLIVER B., JJ., concur.

THE KLEIN & HEFFELMAN CO. v. PETERMAN
ET AL.

Negotiable instruments—Defenses distinguished—Want of consideration and failure of consideration—Charge to jury—Res adjudicata—Fraud.

1. Where the defenses of want of consideration and failure of consideration and fraud are interposed, failure to instruct the jury fully as to each of these defenses and the burden of proof with reference to each constitutes prejudicial error.
2. The judgment in an equity case, in which the issues joined were tried on their merits and the court found on said issues for the defendant and dismissed the petition, is a complete bar and proper defense to a second action involving the same issues.

(Decided September 14, 1916.)

ERROR: Court of Appeals for Wayne county.

Messrs. Rice & Souers and Messrs. Weygandt & Ross, for plaintiff in error.

Messrs. Critchfield & Hay, for defendants in error.

HOUCK, J. This is a proceeding in error in which it is sought to reverse the judgment of the common pleas court of Wayne county.

The plaintiff in error was the plaintiff below and the defendants in error, Martha and T. J. Peterman, were the defendants below.

The basis of the suit below was to recover the sum of \$200, as evidenced by three promissory notes, which were executed by the defendants and delivered by them to plaintiff in part payment of the purchase price of a piano, the sum of \$25 being paid in cash.

The notes were secured by chattel mortgage on the piano purchased.

The petition contained a second cause of action asking for a foreclosure of said chattel mortgage.

The defendants in their answer admitted the execution and delivery of the notes and chattel mortgage, and the cash payment; and by way of defense alleged fraud in the transaction on the part of plaintiff, consisting of false and fraudulent misrepresentations concerning the quality of the piano. For further defenses defendants alleged want of and a failure of consideration for said promissory notes. They also prayed for a judgment for the \$25 cash paid.

The reply filed by the plaintiff was in the nature of a general denial; and it further set forth that in a certain suit in equity, heretofore filed in the common pleas court of this county by the defendants herein against the plaintiff, upon issues joined and a final hearing had on the merits, all of the matters and things set up in the alleged defenses of the defendants in the case at bar were fully heard and determined by the trial court in favor of the said defendant in that case, being the plaintiff herein, and the plaintiff herein pleads same

as a complete bar to the alleged defenses in the present case.

Upon these pleadings and the evidence the present case was submitted to a jury in the court below, and a verdict returned in favor of the defendants in the sum of \$25, and the court entered a judgment on said verdict.

Plaintiff in error seeks a reversal of this judgment, and in oral argument relies upon two grounds of alleged error, to-wit:

1. That the court erred in its general charge to the jury.

2. That the court erred in excluding the evidence offered by plaintiff in support of its plea of *res adjudicata*.

Counsel for plaintiff in error, in support of their first ground of alleged error, insist that the trial judge misdirected the jury as to the burden of proof concerning the defenses of want of consideration and failure of consideration, and, further, that the trial court did not separate from the other defenses the alleged defense of fraud, etc.

In examining the charge of the court we find that the claim of plaintiff in error, in this particular, is well founded.

Want of consideration, in law, means, and is, a total lack of any valid consideration for the contract, in consequence of which the alleged contract must fall.

Failure of consideration, in law, is just what the plain meaning of the words implies, that is to say, failure of consideration is the neglect, refusal and failure of one of the contracting parties to do,

perform or furnish, after making and entering into the contract, the consideration in substance and in fact agreed upon.

This being an affirmative defense, the burden of establishing it is always upon the one who asserts it.

But it is otherwise where the defense is want of consideration. When want of consideration is set up as a defense, in the answer, an issue of fact is raised upon that point, on which the plaintiff has the affirmative, and, the presumption being *prima facie* only and not conclusive, the burden of proof rests upon the plaintiff to establish this fact by the preponderance of all the evidence offered on the question.

From our examination of the charge we think the trial judge did not properly charge the jury upon these questions; that he wholly failed to explain to the jury upon whom the law places the burden of proof as to the alleged defenses of want of consideration and failure of consideration; and we further find that the trial judge neglected and failed, in his instructions to the jury, to distinguish as to the difference between the defenses of want of consideration and failure of consideration, and that he wholly and entirely neglected and failed to properly charge the jury as to the separate defenses of want of consideration, failure of consideration, and fraud. These being separate and distinct defenses the jury should have been fully instructed concerning the law as to each and all of them, the proof required to establish each and all of them, and upon whom the

burden of proof rested to establish each of those defenses.

Coming now to the second ground of alleged error, Did the court err in excluding the evidence offered by the plaintiff in support of its plea of *res adjudicata*? We must answer this question in the affirmative.

From an examination of the record of the equity case, which was offered in evidence by the plaintiff in the instant case and excluded by the court, we find that the equity case was brought by the present defendants prior to the commencement of the case at bar, seeking the cancellation of the same notes and chattel mortgage involved in this case, upon the alleged grounds of fraud, etc., being the same grounds set up for defense in the instant case; also it was sought to recover the \$25 cash paid, being the same cash payment for which judgment was entered in the present case. The equity case being tried on its merits upon the issues joined, the final entry in the case discloses that the court "found the issues joined in favor of the defendant [the plaintiff in error], and dismissed the petition with costs."

The issues in the equity case were the same as in the present case; and the relief sought was the same, which included the recovery of the \$25 cash paid; and the judgment in the equity case was certainly a complete bar and proper defense to the allegations in the answer of defendants in the case under review.

This being so, the court below committed prejudicial error in excluding from the evidence the

record and final judgment in the equity case in the trial of the case at bar.

This court has heretofore passed upon this question, and its views may be found in the reported case of *Feazel v. Feazel*, 5 Ohio App., 63.

We also feel that our supreme court has finally settled this question in the case of *Doyle v. West*, 60 Ohio St., 438, in which Judge Minshall, speaking for the court, says at page 443:

"The policy of the law is against the relitigation of questions of law or fact, once heard and determined between the same parties. A question of fact once so determined is binding on the same parties in all subsequent litigation."

We therefore hold there is prejudicial error in the record, as against the rights of the plaintiff in error, as hereinbefore set forth, and therefore the judgment of the common pleas court must be reversed and the cause remanded to the court from whence it came for a new trial or such other proceedings as the law requires.

Judgment reversed, and cause remanded.

SHIELDS and POWELL, JJ., concur.

DIEHL v. THE CINCINNATI TRACTION CO.

*Passenger on street car—Given wrong transfer by conductor—
Second conductor ejects passenger—Liability of company to
passenger.*

A passenger on a street car who has paid his fare and is entitled to ride over another line of the same company, and who, having asked for a transfer over such other line, is given, by mistake of the conductor, a transfer not properly punched as to time, may nevertheless, if he has exercised ordinary care and prudence about the receiving and making use of such transfer, lawfully insist upon being carried over such other line without further payment of fare; and if such passenger, without fault on his part, is ejected from a car for refusing to pay fare other than by such transfer, he may recover damages for the tort and cannot be restricted to damages for breach of the contract to carry him.

(Decided June 21, 1915.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Fulton & Woost, for plaintiff in error.

Mr. Joseph Wilby, for defendant in error.

ORMAN, J. In the common pleas court plaintiff in error, George S. Diehl, sought to recover from defendant in error damages for an alleged wrongful ejection from one of the East End cars of the defendant in error. At the close of the plaintiff's evidence, the court, upon a motion to instruct a verdict in favor of the defendant, granted the same, and judgment was entered in favor of the defendant upon the instructed verdict. This error proceeding is to reverse that judgment.

It appears in the record that on the morning of the 28th of June, 1912, plaintiff in error left his

home on Hosea avenue about eight o'clock and boarded a south-bound Vine and Clifton car at the corner of Jefferson and Brookline avenues. He paid his cash fare of five cents and asked the conductor for a transfer to an East End car going east. The conductor received his money and gave him a transfer slip. The slip was punched for the East End car going east, but the punching was marked 15 minutes later than the time at which it should have been properly punched. Plaintiff in error left the Vine and Clifton car at Fifth and Vine, hurried down Vine street to Fourth, one square, boarded an East End car going east, and tendered his transfer to the conductor, who refused to receive the same because, as he stated, "the time of the punching was too late." He ejected plaintiff in error from the car upon his refusal to pay an additional fare, and put plaintiff in error as well as his suitcase or bag out upon the street. Plaintiff in error did not know that the transfer slip was punched at the wrong time, nor was there any evidence tending to show that he was in any wise negligent in accepting the transfer and in leaving the Vine and Clifton car and boarding the East End car, unless it may be that he was negligent in failing to notice the time punched on the transfer slip.

We are of the opinion that this was a proper case to submit to the jury on the question of whether or not the plaintiff in error was negligent in not discovering that the transfer slip had the wrong time punched upon it.

The rule, in a case where the facts are similar to those above set out, is stated in 1 Nellis on Street

Railways (2 ed.), Section 267. Among other things in this section, it is stated:

"A rule with respect to the punching of transfers is reasonable, if due precaution be taken to insure its observance and application in such a manner as to protect a passenger from the errors or mistakes of the conductor. If the passenger, by reason of the inattention of the company's servants to its own rules regarding transfers, or to statutory requirement in that regard, is ejected, an action for the breach of the contract of transportation is not his only remedy. If it were, the carrier might be encouraged to employ negligent or incompetent conductors, to the serious annoyance and inconvenience of the traveling public, and passengers would not be afforded reasonable protection or security in their rights. If a passenger entered the car believing his transfer was valid, and was not negligent in failing to discover that it had been punched erroneously, he was there lawfully, and is entitled to maintain an action for the wrongful ejection, and to receive compensating damages for the loss of time, fare on another car, and injury to his feelings because of the indignities suffered by him and his wrongful ejection from the car."

This doctrine appears to be supported by the case of *Cleveland City Ry. Co. v. Conner*, 74 Ohio St., 225, where it is stated in the first paragraph of the syllabus:

"A passenger on a street railway, who has paid fare and is entitled to ride over another line belonging to the same company, and who, having asked for a transfer ticket over such other line, is

given, by mistake of the conductor, a transfer which is not good over such other line, may nevertheless, if he has exercised such care about the receiving and making use of the transfer ticket as persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, lawfully insist upon being carried over such other line without further payment of fare; and if such passenger, without fault on his part, is ejected from a car for refusing to pay fare other than by such transfer ticket, he may recover damages for the tort and cannot be restricted to damages for breach of the contract to carry him."

A passenger upon paying his fare and receiving a transfer which he has requested, and which transfer the street railway company is obliged to give under the law and the provisions of its charter, has a right to assume that the servant of the street railway company will perform his duty in giving him a proper transfer properly punched as to time. 1 Nellis on Street Railways (2 ed.), Section 273.

In the case of *Eddy v. Syracuse Rapid Transit Ry. Co.*, 50 App. Div. (N. Y.), 109, it was held:

"Where a passenger upon a street car receives from the conductor a transfer containing the following condition: 'Good only at transfer junction—on first connecting car, after time canceled on the line punched, subject to the Rules of this Company,' and, without knowledge that the time at which the transfer had been issued was erroneously punched, and without being negligent in failing to discover that fact, boards the first car on which the transfer would have entitled him to ride, if it had been properly punched, his ejection from such car be-

cause of the conductor's refusal to honor the transfer, is wrongful and entitles him to recover from the railroad company compensatory damages for the indignity, humiliation and injury to his feelings caused by such wrongful ejection and the remarks of the conductor attending it."

In the case of *Memphis St. Ry. Co. v. Graves*, 110 Tenn., 232, it is held:

"It is negligence on the part of a street car company for a conductor to give a passenger a wrong transfer ticket, and the passenger can accept the transfer ticket without question, and his acceptance of such ticket will not constitute negligence on his part. The passenger will not be required to scrutinize the ticket, but he may assume that the conductor has given him the proper ticket; and if the conductor make a mistake, it is the fault of the company, for which it is liable."

It is further held in the second paragraph of the syllabus of this case:

"When a passenger on a street car pays his fare, and is, by the conductor thereon, given a transfer ticket, which the conductor on another car, to which the passenger properly changes, refuses to accept, and the passenger is forcibly expelled from the car, he can recover from the street car company all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained."

The amount of damages which the plaintiff in error might be entitled to recover would depend upon the circumstances of the case, but that question is not presented by the record in this case, because the jury had no opportunity to pass upon the

question of damages, but were precluded from considering the case by the ruling of the trial court in arresting the case from their consideration.

The judgment of the court of common pleas will be reversed and a new trial granted.

Judgment reversed, and new trial granted.

JONES, E. H., and JONES, OLIVER B., JJ., concur.

SIGOURNEY v. THE STATE OF OHIO.

Criminal law—Former jeopardy—Directed verdict on prior indictment.

Where a verdict of not guilty has been directed on the application of the defendant, on the ground that the indictment was fatally defective, he cannot thereafter plead former jeopardy when re-indicted for the same offense.

(Decided October 5, 1916.)

ERROR: Court of Appeals for Huron county.

Mr. Leonard S. Wise and Mr. Frank Carpenter,
for plaintiff in error.

Mr. Irving Carpenter, prosecuting attorney, for
defendant in error.

RICHARDS, J. At the March term, 1916, J. D. Sigourney was indicted by the grand jury on the charge of forgery. To this indictment he filed a plea of former acquittal, which plea set forth, in substance, that he had been theretofore indicted and

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tried on the same charge; that on such former trial the State of Ohio had offered evidence in support of the charge; and that at the conclusion of the evidence on behalf of the state he had filed a motion asking that the jury be directed to return a verdict in his favor for the following reasons, first, "that the indictment does not state facts constituting an offense punishable by the laws of the State of Ohio; and, second, lack of sufficient evidence of the fact of the uttering and publishing of forged instruments for the payment of money." The court, as appears by the record, overruled the motion as to the second ground, but granted the motion as to the first ground, to-wit, that the indictment failed to state facts constituting an offense.

The State of Ohio filed a demurrer to this plea of former acquittal, and the trial court on consideration sustained the demurrer. Thereupon the defendant was placed on trial and convicted and sentenced.

No bill of exceptions was taken and the only question we have for consideration is, Did the trial court err in sustaining the demurrer to the plea of former acquittal? The plea of former acquittal sets forth the indictment in the first case, and it appears from an examination of that indictment that it was fatally defective in omitting a line or two which evidently contained the gravamen of the charge. The charge against the defendant in the original case being so fatally defective was in law no indictment, and in this respect the case is similar to a civil action where a demurrer is sustained to the petition on the ground that it does not state facts sufficient to constitute a cause of action. It has

been repeatedly held in civil actions of that character that the sustaining of a demurrer to such a petition and the rendition of a judgment dismissing the case do not constitute *res adjudicata*. *Moore v. Dunn*, 41 Ohio St., 62, and *Rafferty v. The Toledo Traction Co.*, 1 C. C., N. S., 538.

Furthermore it is perfectly clear that the court in the first trial having directed a verdict at the instance of the defendant, and on the ground that the indictment was fatally defective, defendant is now estopped to urge that the judgment so procured by him is a bar to this action. (*Stewart v. State of Ohio*, 15 Ohio St., 155.) The direct question was so decided in *State v. Meekins*, 41 La. Ann., 543, 6 So. Rep., 822. The general principle is also stated in 12 Cyc., 266, and is forcefully announced in the following language in 8 R. C. L., 152:

"It may be stated as a general rule that where an indictment is quashed at the instance of the defendant, though after jeopardy has attached, he can not thereafter plead former jeopardy when placed on trial on another indictment for the same offense."

We find no error of the trial court in sustaining the demurrer to the plea of former acquittal. The judgment will, therefore, be affirmed.

Judgment affirmed.

CHITTENDEN and KINKADE, JJ., concur.

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Moores Lime Co. v. N. & W. Ry. Co.

THE MOORES LIME CO. v. THE NORFOLK &
WESTERN RY. CO.

Demurrage charges—Refusal of consignee to accept freight—Notice by carrier to consignor—Duty of consignor to give disposition of rejected shipments.

When a consignee refuses to accept and unload certain carloads of freight, and the consignor, upon notice of that fact and request from the carrier, refuses to give disposition of the same for the assigned reason that it is not the owner of the contents of the cars and has no right to dispose of same, the consignor is liable for the demurrage charges accruing after the shipment was rejected by the consignee, it being the duty of the consignor, under such circumstances, to promptly give disposition of cars upon request from the carrier so to do.

(Decided February 28, 1916.)

ERROR: Court of Appeals for Hamilton county.

Mr. Charles M. Leslie, for plaintiff in error.

Messrs. Hollister & Hollister, for defendant in error.

JONES, E. H., P. J. Three carloads of crushed stone were shipped prepaid from The Moores Lime Company at Springfield, Ohio, via the C., C., C. & St. L. and the N. & W. railroads to R. Wilhelmy at Bond Hill, Ohio; one car on each of the following dates: September 28, September 29 and October 10, 1910.

There is a written stipulation as to facts in this case, which recites:

"The consignee refused to accept and unload said cars. That after said refusal by said consignee to accept or unload said cars, notice was given de-

fendant [The Moores Lime Company], and defendant was requested to give disposition of same, which defendant refused to do for the assigned reason that it was not the owner of the contents of said cars and had no right to dispose of same."

The action below was brought by the railway company to recover from The Moores Lime Company demurrage charges which accrued after these refusals by the consignee and consignor—the refusal to accept the stone by the former and the refusal to give disposition or exercise ownership by the latter. There is no question raised as to any fact material to the determination of this case. The question presented is one of law, viz.: Under these conditions is the consignor obliged to pay the demurrage charges accruing after the shipment is rejected by the consignee?

Certain principles discussed in argument as having a bearing upon this question are well recognized. For example, it must be conceded that the title to the crushed stone from the time it was loaded at Springfield until it arrived at Bond Hill was in Wilhelmy, the consignee. It would be so considered in the determination of any question arising while the stone was *in transitu*. But when the consignee refused to take the stone there was a changed situation. There was no contract between the carrier and Wilhelmy. The carrier had made a written contract with the lime company to carry and deliver the stone at a certain place, to a person named in the written contract. When the person so named as consignee refused to receive the consignment it became the duty of the carrier to ask for directions or disposition from its employer, who

was the only person in the transaction with whom it sustained a contractual relation or had any privity of contract.

The carrier, simply because the goods sold were on its cars and in its possession, could not be drawn into or be made to suffer by a dispute, of whatever nature, between the vendor and vendee. It had performed its duty in safely delivering the cars and placing same in the yard at Bond Hill.

When the shipment was refused at its destination a new and different relation arose between the shipper and the carrier. The latter became the custodian or bailee of the stone, with duties and responsibilities resting upon it similar to those of a warehouseman. The position taken by the shipper, as indicated in the part of the statement of facts above quoted, is and was untenable. It should have promptly given disposition of cars, upon request from the carrier so to do. The railway company was at the time justified in looking to it as the owner of the stone, and under the 8th condition of the bill of lading it was liable, as "owner," for all charges accruing thereafter.

Judgment affirmed.

JONES, OLIVER B., and GORMAN, JJ., concur.

JAMES v. THE HOTEL HONING CO.

Malicious prosecution—Action for damages—Equivocal or ambiguous entry on court docket—Explanation by parol evidence.

1. In an action for malicious prosecution resulting from the arrest of plaintiff, caused by defendant, in the municipal court of Cincinnati, on the charge of defrauding an innkeeper, evidence was introduced by the testimony of the deputy clerk of the municipal court, who produced and identified the judge's and clerk's dockets of the municipal court, each of which showed the notation as to said case: "Dismissed for want of prosecution. Costs of warrant." The trial court refused to permit the plaintiff to answer the question: "Were you actually dismissed from that court?" *Held:* That it was error in the trial court to refuse to permit the plaintiff to testify as to the fact of his dismissal, considering the equivocal or ambiguous entry found in the journal.
2. An equivocal or ambiguous entry appearing upon the docket or journal of a court may be explained by parol evidence.

(Decided February 28, 1916.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Philip & S. C. Roettinger and Mr. Harry B. Street, for plaintiff in error.

Messrs. Cogan, Williams & Ragland and Mr. Horace A. Reeve, for defendant in error.

JONES, OLIVER B., J. The parties stand in this court in the same position they held in the court below. The action is one by David J. James for malicious prosecution, resulting from the arrest of plaintiff in April, 1914, caused by defendant, in the municipal court of Cincinnati, on the charge of defrauding an innkeeper.

At the close of plaintiff's testimony, the court, on motion of defendant, directed a verdict in its favor. These error proceedings are brought to secure a reversal of that judgment.

While it was said in *Fortman v. Rottier et al.*, 8 Ohio St., 548, 550, that it was essential in an action for malicious prosecution that it must be shown not only that the prosecution complained of was at an end, but that "it must also appear that the plaintiff was acquitted of the charge," the later cases of *Douglas v. Allen*, 56 Ohio St., 156, and *Gaiser v. Hurlleman*, 74 Ohio St., 271, 275, hold that it is sufficient to show that the prosecution was legally terminated before the commencement of the action.

The final journal entry in the case in the municipal court, which was produced in evidence, is as follows:

"This cause coming on for hearing upon the affidavit and warrant filed herein, defendant being in open court and arraigned, and after examination the court do order said defendant to pay the costs of warrant. Costs paid."

The court refused to permit the plaintiff to answer this question: "Were you actually dismissed from that court?" To this ruling plaintiff excepted and made tender of proof that plaintiff, if permitted to answer, would have stated that he was dismissed. Evidence was introduced, however, by the testimony of the deputy clerk of the municipal court, who produced and identified the judge's and clerk's dockets of the municipal court, each of which showed the notation as to said case to be: "Dis-

missed for want of prosecution. Costs of warrant."

Defendant below and the trial court evidently relied upon the case of *Grosse v. Oppenheimer et al.*, 11 C. C., N. S., 374. That case was decided upon demurrer, the petition alleging "that the said cause was terminated * * * by said plaintiff being obliged to pay the costs of said prosecution," and the court there held that such an entry must be construed to mean "that she was found guilty of the charge and fined the costs."

That case however is not identical with the instant case. Here, while the journal entry is indefinite and ambiguous as to whether the court found that the defendant was guilty or not guilty of the charge made, the explanation given by the evidence offered, especially the entries in both the judge's and clerk's dockets, shows that the defendant was dismissed. This evidence was admitted without objection or exception from the defendant, and it was competent.

"Although the usual method of proving the proceedings of a court is by the record as completed and extended, it has frequently been held that the minutes or memoranda upon the *docket of the clerk* of the court or the magistrate are competent evidence of an order or proceeding in court, in case the extended record has not been made. The docket is the record, until the record is fully extended; and the same rules of verity apply to it as to the record. Every statement therein is deemed to have been made by the direction of the court." 3 Jones Commentaries on Evidence, Section 621.

See also *W., A. & G. Steam-Packet Co. v. Sickles et al.*, 24 How. (65 U. S.), 333.

In the opinion of this court it was error in the trial court to refuse to permit the plaintiff to testify as to the fact of his dismissal, considering the equivocal or ambiguous entry found in the journal. It seems well settled that such an entry may be explained by parol evidence. 1 Freeman on Judgments (4 ed.), Sections 273, 274 and 275; *Russell v. Place*, 94 U. S., 606, 608; *Leopold v. City of Chicago*, 150 Ill., 569, 574; *Lyman v. Becannon*, 29 Mich., 466; *Walker v. Chase*, 53 Me., 258, and *Foye v. Patch*, 132 Mass., 105.

As to the right to explain a judgment by parol evidence, see also *Parsons v. Ohio Pail Co. et al.*, 6 C. C., N. S., 116.

The court erred in directing a verdict for the defendant, and the judgment is therefore reversed and the cause remanded for a new trial.

Judgment reversed, and cause remanded.

JONES, E. H., P. J., and GORMAN, J., concur.

BOLAN v. THE MITCHELL BRICK CO.

Proceedings in aid of execution — Exemption in lieu of homestead — Concealment of property not in custody of court.

Thurber & Browning, partners, entered into a contract with the state of Ohio to build a road known as the New Richmond Turnpike for the sum of \$12,000, and thereafter assigned this contract to Mary B. Bolan. The assignment was not made a matter of record, and \$1,183.40 was paid to Thurber & Browning on account of work done on the road by Mary B. Bolan. Under the contract the state was to retain 15 per cent. of the estimates until the work was finally completed, and under this provision \$208.85 was retained by the state. *Held:* In a proceeding in aid of execution to reach the property of John M. Bolan, husband of Mary B. Bolan, the \$208.85 retained by the state was the property of Mary B. Bolan. Under the above-stated facts, the doctrine — that where a debtor entitled to exemption in lieu of a homestead conceals money and property which he has a right to have at the time of the examination, and has other property in the custody of the court, his concealment of property not in the custody of the court should be deemed to be an election on his part to take that property as a part of his claim in lieu of a homestead — has no application.

(Decided July 6, 1915.)

ERROR: Court of Appeals for Hamilton county.

Mr. Frank E. Wood and *Mr. Charles Sawyer*,
for plaintiff in error.

Mr. Froome Morris, for defendant in error.

GORMAN, J. The defendant in error at the April term, 1913, of the common pleas court recovered a judgment against the plaintiff in error, John M. Bolan, for \$755.49. Execution was issued and returned *nulla bona*. The judgment remained unpaid and unsatisfied. Thereafter, in the October

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term, 1914, defendant in error instituted proceedings in aid of execution against the plaintiff in error, making The German National Bank, The Gordon Engineering Company and Mary B. Bolan, wife of the plaintiff in error, parties as garnishees, and the court enjoined the parties from disposing of any property in their hands belonging to plaintiff in error.

A referee was appointed to take the testimony and report to the court, all of which was done, and the report filed. Among other things the report of the referee found that there was a credit due to John M. Bolan from The German National Bank of Cincinnati, of \$283.05; and from The Gordon Engineering Company, \$250.80. The referee further found that John M. Bolan had been carrying on a contracting business all his life, and during the last four years had been apparently carrying on his business in his wife's name. The referee further found that the defendant John M. Bolan, and Mary B. Bolan his wife, sought to make it appear that there was either no money due from The Gordon Engineering Company or that such as was due was due on account of work done by the wife under her individual contract; and he found that both these contentions were utterly false.

After the report of the referee was filed there was a further hearing of evidence in the common pleas court, and it then developed that Thurber & Browning, partners, had entered into a contract with the state of Ohio to build a road known as the New Richmond Turnpike for the sum of \$12,000; that Thurber & Browning had assigned their con-

tract to Mary B. Bolan for the consideration of \$800 and that she had given her note to them for \$800, payable when the work should be completed; that \$1,183.40 had been paid by the state on account of this contract; and that Thurber & Browning had paid this money to Mary B. Bolan. The assignment of the contract was not made a matter of record by the state, and the money was therefore paid to the original contractors, Thurber & Browning, and by them turned over to Mary B. Bolan. Under the contract the state was to reserve 15 per cent. of the estimates until the work was finally completed, and on account of the work finished there was retained by the state the sum of \$208.85, which sum was not due at the time of the hearing, and would never be due unless the work was completed—or until the work should be finally completed and accepted by the state.

The common pleas court held that this \$208.85 not yet due was the money of John M. Bolan, and the court further found that there was a credit due Bolan in The German National Bank, \$283.05, and from The Gordon Engineering Company, \$250.80. Bolan made demand during the progress of the trial to have the money on deposit in The German National Bank and the money due from The Gordon Engineering Company set off to him as exempt from levy and execution—he being a married man, the head of a family, and not the owner of a homestead. The court of common pleas held that the \$208.85, the retained percentage of the state, belonged to Bolan, and that he had concealed this asset and by that act had elected to select that \$208.85 as a part of his exemption in lieu of his

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homestead. The court allowed Bolan his exemption of \$500 under the statute, but made the allowance as follows:

Retained percentages.....	\$208.85
Due from Gordon Engineering Co....	250.80
<hr/>	
Making	\$459.65

In addition thereto the court allowed from the amount of money on deposit in The German National Bank the sum of \$40.35, to make up amount of the exemption in lieu of a homestead, \$500.

We are of the opinion that the \$208.85 was not the money of John M. Bolan, but that under the contract between his wife Mary B. Bolan and Thurber & Browning these retained percentages under the contract with the state of Ohio belonged to Mary B. Bolan, if they ever became due, which they were not at the time of the hearing. Mary B. Bolan may never realize anything out of these retained percentages; she can secure the retained percentages only if she completes the work on the New Richmond Turnpike, and there remains more than \$10,000 worth of work yet to be done on that job. Complications may arise which would prevent her from recovering these retained percentages even if the work were finished. We are of the opinion that even if this contract were John M. Bolan's the retained percentages, not being yet due, would not be available for him as part of his exemption in lieu of a homestead.

There is no question but that Bolan is entitled to his \$500 exemption in lieu of a homestead, and that

amount should have been set off to him, as he selected, out of the funds in The German National Bank and the money due from The Gordon Engineering Company. As to the retained percentages, if when they become due it should be found that the money belongs to John M. Bolan, the defendant in error is not precluded by the judgment and finding in this case from subjecting that fund to the payment of its claim.

For the present it is sufficient to say that there should be allowed to Bolan, out of the moneys due from The Gordon Engineering Company and The German National Bank, \$500. There will remain \$33.85, which can be applied by the defendant in error upon its indebtedness.

The case cited by counsel for both plaintiff in error and defendant in error, *Haslage v. Hoover et al.*, 16 C. C., 570, we think holds that where the debtor entitled to exemption in lieu of a homestead conceals money and property which he has a right to have at the time of the examination, and has other property in the custody of the court, that his concealment of property not in the custody of the court should be deemed to be an election on his part to take that property as a part of his claim in lieu of a homestead; but we do not think that case has any application to the facts developed in the case at bar.

There being no dispute as to the facts in this case we are of the opinion that a judgment should be entered in this court such as should have been entered in the court below, allowing Bolan \$500 exemption, in lieu of his homestead, out of the moneys in The German National Bank and due

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from The Gordon Engineering Company, the excess over and above \$500 to be allowed to the creditor, the defendant in error.

As to the retained percentages, under the contract for the construction of the New Richmond Turnpike, the court is of the opinion that the judgment of the court below should be reversed.

Judgment accordingly.

JONES, E. H., and JONES, OLIVER B., JJ., concur.

JACKSON v. THE NELSONVILLE FOUNDRY &
MACHINE CO. ET AL.

Oral evidence—Action on judgment—Identity of parties—Misdescription of partnership as corporation—Corporations—Imputed knowledge of agent—Unauthorized warrants to confess judgment—Ratification by acquiescence—Facts constituting ratification—Nonfeasance of stockholders and directors—Validity of judgment by confession.

1. In a suit on a judgment oral evidence is admissible to show that the plaintiff in the record of the judgment is identical with the plaintiff in such suit.
2. Where, from the oral evidence, it appears that in the record of the judgment the plaintiff therein was by mistake described as a corporation, when in fact the plaintiff was a partnership, or its assignee, seeking to recover on the judgment, such evidence should not be excluded.
3. The knowledge acquired by an officer of a corporation, when acting in his official capacity and in regard to a matter with which he is especially charged by the board of directors, is the knowledge of the corporation for any and all judicial purposes.
4. The secretary-treasurer of a corporation, together with its president, having been authorized by the board of directors to make notes to banks to cover overdrafts, and having without authority executed notes with warrants of attorney containing

- power to confess judgment against the company and in favor of the obligee therein named, the knowledge of the secretary-treasurer thereby obtained that the notes contained such warrants is the knowledge of the corporation.
5. When knowledge is obtained by a corporation of an unauthorized act of its officer it may ratify the same by acquiescence, continued for a number of years, without any formal action of its board of directors.
 6. When a corporate officer signs notes authorized by the board of directors containing unauthorized warrants of attorney for the entry of judgment by confession, and the notes remain unpaid, save the payment of the annual interest thereon, for more than thirteen years, such acquiescence on the part of the corporation is a ratification of the unauthorized acts of its officers.
 7. If the stockholders of a corporation permit the directors to surrender their powers and functions to an executive officer of the corporation as a continuous and permanent arrangement, the board of directors being entirely inactive and the officer discharging all its duties, the acts of such officer under such circumstances are binding upon the corporation.
 8. So, where the general manager of a corporation whose board of directors as such has become defunct with the knowledge and consent of the stockholders, and the general manager with their consent directs and controls all its business affairs, a note signed by the president of the corporation and by such general manager as secretary, containing warrants of attorney for the confession of judgment, is binding upon the corporation and it cannot avoid a judgment obtained by confession in a suit on such note on the ground that the execution of the note by the general manager was unauthorized and void.
 9. In an action by a partnership on notes containing warrants of attorney for the entry of judgment by confession, failure to aver in the petition that the partnership was formed for the purpose of carrying on a trade or business in Ohio does not render the judgment void.

(Decided June 7, 1916.)

APPEAL: Court of Appeals for Athens county.

March 23, 1914, plaintiff, Harry H. Jackson, filed a petition in the court of common pleas of Athens

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county, in which he stated that the defendant was a corporation and indebted to him in the sum of \$7,950, evidenced by three promissory notes due and unpaid; that it was engaged in manufacturing, was indebted to various persons in a sum exceeding \$40,000, was insolvent and wholly unable to pay its debts; and that it was not able to carry on its business. The petition prayed, among other things, for the appointment of a receiver.

Subsequently W. S. Weitzell was appointed receiver, and on May 29, 1914, filed in the case an application to sell property, in which it was stated that it was necessary to sell the real estate of the corporation to pay its debts. It was recited in the application that Emery Lattanner, as superintendent of banks of the state of Ohio, claimed some interest in such real estate, and there was a prayer that he as such superintendent might be made a party to the action. Lattanner, as superintendent of banks, answered, as also did his successor.

The cause was tried in the court of common pleas, and then appealed.

January 19, 1916, Charles L. Baird, trustee, filed his answer and cross-petition in this court, which in part reads as follows:

"Now comes Charles L. Baird, as Trustee of John C. Baird, Eugene J. Cable and Charles L. Baird, in the liquidation and settlement of the affairs of the Merchants and Miners Bank, a partnership, having been made a party defendant herein and given leave to file this his answer and cross-petition, and says:

"That on or about the 12th day of March, 1914, Emery Lattanner, then Superintendent of Banks of

the State of Ohio, took charge of the affairs and all of the assets of the Merchants and Miners Bank of Nelsonville, Ohio, a partnership, then comprised of Charles A. Cable, Eugene J. Cable, Charles L. Baird and John C. Baird, and thereafter proceeded with the liquidation of the said bank and the administration of its affairs until he was succeeded in said office by Harry T. Hall; that the said Harry T. Hall continued in charge of the liquidation of the said bank and the administration of its affairs until the 14th day of January, 1916; that on said last named date the said Harry T. Hall, as Superintendent of Banks of the State of Ohio, with the approval and authority of the Court of Common Pleas of Athens County, Ohio, in a certain proceeding therein pending, entitled In the Matter of the Liquidation of the Merchants and Miners Bank, and numbered 10940 on the docket of the said court, assigned and transferred to this answering defendant all and singular the assets, choses in action and claims due said Merchants and Miners Bank, including therein the judgment and claim against The Nelsonville Foundry and Machine Company hereinafter set forth.

"This answering defendant further says that at all times hereinafter mentioned prior to the 17th day of February, 1914, one Charles A. Cable, together with Eugene J. Cable and C. Robbins were partners carrying on a banking business at Nelsonville, Ohio, in the firm name and style of the Merchants and Miners Bank; that on said 17th day of February, 1914, said C. Robbins assigned and transferred his interest in the said partnership to Charles L. Baird and John C. Baird, and there-

after until the 12th day of March, 1914, the said Charles A. Cable, Eugene J. Cable, Charles L. Baird and John C. Baird, as partners as aforesaid, carried on the said banking business in the said name and style.

"The defendant, The Nelsonville Foundry and Machine Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, in consideration of money procured by it from said Merchants and Miners Bank, executed and delivered to the said Merchants and Miners Bank its several promissory notes as follows, to-wit: * * *

"That said Merchants and Miners Bank continued to hold and own said notes from the time of the execution and delivery of each of them as aforesaid until the 18th day of January, 1911, when the said notes were merged in the judgment hereinafter set forth.

"That on said 18th day of January, 1911, said Merchants and Miners Bank, in a certain action pending in the court of common pleas of Madison county, Ohio, entitled Merchants and Miners Bank vs. The Nelsonville Foundry and Machine Company, and numbered 11306 on the docket of the said court, by the consideration of the said court recovered a judgment on the said promissory notes against the said The Nelsonville Foundry and Machine Company in the sum of \$18,440.33, with interest from January 18, 1911, at the rate of seven per cent per annum, and costs of suit taxed at \$. Said judgment is unreversed and unsatisfied and no part thereof has been paid, except the interest thereon to January 1, 1914.

"Pursuant to the said warrants of attorney said The Nelsonville Foundry and Machine Company entered its appearance in said cause, confessed said judgment and waived and released all errors therein. * * *

"This answering defendant further says that in the petition filed in the said action in the court of common pleas of Madison County wherein the said Merchants and Miners Bank was plaintiff and The Nelsonville Foundry and Machine Company was defendant, numbered 11306 on the docket of the said court, it was alleged that the plaintiff, said Merchants and Miners Bank, was a corporation organized and existing under the laws of the State of Ohio and doing business in Athens County, in said State; that the said allegation of the corporate capacity of said plaintiff was made and inserted in the said petition through inadvertence and mistake by the then attorney of the said Merchants and Miners Bank; that there never was any such corporation organized and existing under the laws of the State of Ohio and doing business in Athens County, Ohio; that the plaintiff in the said action whose corporate capacity was erroneously alleged in the manner aforesaid was the partnership then comprised of the said Charles A. Cable, Eugene J. Cable and C. Robbins; * * *."

The prayer of the cross-petition is that the Madison county judgment be declared the first and best lien.

The name of the plaintiff stated in the caption in the Madison county case is "The Merchants and Miners Bank." There are five causes of action in the petition in that case, each of which sets up a

promissory note executed by The Nelsonville Foundry & Machine Company and payable to Merchants and Miners Bank. Each cause of action contains the averment that "plaintiff is a corporation organized and existing under the laws of the State of Ohio and doing business in Athens County, in said State."

The first note was for \$1,000, dated August 25, 1892, due one day after date. The second was for a like sum, dated August 26, 1892, due one day after date. The third was for \$3,700, dated February 6, 1897, due ninety days after date. The fourth was for \$2,676.07, dated October 16, 1897, due ninety days after date. The fifth was for \$10,000, dated December 31, 1910, due one day after date. The interest on the several notes, except the last, was paid annually.

The note dated August 25, 1892, contained the following:

"And we hereby waive protest and notice thereof, and authorize and empower any attorney at law, in the State of Ohio, or elsewhere, in our names and behalf, or in the name and behalf of any or either of us, to appear before any court of record in said State of Ohio, or elsewhere, at any time after this obligation becomes due, and waive process and service thereof, and without notice, confess judgment against us, or any or either of us, in favor of the said payee for the amount that may appear to be due thereon, for the principal and interest, damages and costs of suit, releasing all errors in the judgment so confessed and waiving all right and benefit of appeal, and any and all

proceedings to set aside, vacate, open, suspend or reverse such judgment, * * * .”

Each of the other notes contained language in effect the same as the language quoted.

The two notes for \$1,000, one dated August 25 and the other August 26, 1892, were executed on the authority of the board of directors of The Nelsonville Foundry & Machine Company, which authority was expressed in the following words: “That the president and secretary be authorized to make a loan of \$5,000.00 to meet overdraft in bank and for future requirements.” The note for \$3,700 was executed on the authority of the directors expressed in the following language: “By motion the secretary was authorized to make notes to the banks to cover overdrafts.” The note for \$2,676.07 was executed on the authority of the directors that “the president and secretary be authorized to give notes for same.” The board of directors gave no authority for the execution of the \$10,000 note.

Since prior to August 25, 1892, Charles A. Cable, Eugene J. Cable and C. Robbins were partners carrying on a banking business at Nelsonville, Ohio, in the firm name and style of Merchants and Miners Bank, the payee in the above-named notes. The notes were given for money loaned The Nelsonville Foundry & Machine Company. At the date of the first and second notes, August 25 and 26, 1892, the directors of The Nelsonville Foundry & Machine Company were Charles A. Cable, the same person who was one of the firm doing business as Merchants and Miners Bank, J. W. Jackson, R. Barnecut, Charles Robbins and C. E. Poston. These notes were signed: “The Nelsonville Foundry

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& Machine Co., By Chas. A. Cable, President, and C. E. Poston, Secretary-Treasurer." In 1897, when the second and third notes above referred to were given, Charles A. Cable, C. Robbins, C. E. Poston, J. W. Jackson and R. H. Jackson were the directors, and the note of February 6, 1897, was signed: "The Nelsonville Foundry & Machine Co., By J. W. Jackson, President, and C. E. Poston, Secretary-Treasurer." The note of October 16, 1897, was signed: "The Nelsonville Foundry & Machine Co., By C. E. Poston, Secretary-Treasurer." The minutes of The Nelsonville Foundry & Machine Company recite that on April 29, 1909, there was held the annual meeting of its stockholders and "that the majority of the stock being present the meeting was called to order, * * * Stockholders present: C. A. Cable, C. Robbins, H. H. Jackson [plaintiff] and R. H. Jackson." Directors elected were: C. A. Cable, C. Robbins, Fred Weymueller, H. H. Jackson and R. H. Jackson. At a meeting of the directors held the same day C. A. Cable was elected president, and R. H. Jackson secretary-treasurer. The same record recites that there was a stockholders' meeting on August 22, 1912, at which time C. A. Cable, C. Robbins, H. H. Jackson, R. H. Jackson and some one in the place of Weymueller were elected directors. Neither the stockholders nor directors of The Nelsonville Foundry & Machine Company have ever met since April 29, 1909, except on the one occasion, August 22, 1912, when the stockholders reelected the old board of directors with one exception. Mr. R. H. Jackson has been secretary-treasurer of The Nelsonville Foundry &

Machine Company since 1901, and general manager since prior to 1909, and during all that time has been the one salaried official of the company, and its control has been in his hands.

Oral evidence was received at the trial in this court, over the objection of The Nelsonville Foundry & Machine Company, to show that Merchants and Miners Bank, described as a corporation in the Madison county suit, was the partnership composed of Charles A. Cable, C. Robbins and Eugene J. Cable, doing a banking business in Nelsonville, and whose assignee is Charles L. Baird, Trustee. Oral evidence was also received, over the objection of such defendant, to show that there is no Ohio corporation by the name of The Merchants and Miners Bank. The Madison county judgment was taken January 18, 1911. The petition in that case did not contain an averment that the plaintiff was a partnership formed for the purpose of carrying on a trade or business in Ohio.

Messrs. Grosvenor, Jones & Worstell and Mr. L. G. Addison, for W. S. Weitzell, receiver.

Messrs. Foster & Wells and Messrs. Webber, McCoy & Jones, for Charles L. Baird, trustee.

SAYRE, J. The judgment record in the Madison county case introduced in evidence here shows that the plaintiff was described in that case as a corporation. The introduction of the judgment record is objected to because it does not show that the plaintiff therein is identical with Merchants and Miners Bank, a partnership.

Oral evidence, introduced on the trial, shows that Merchants and Miners Bank, a partnership, employed a lawyer to take judgment for it in Madison county on cognovit notes against The Nelsonville Foundry & Machine Company, and that he by mistake described the plaintiff in that case as a corporation, and further that there is no Ohio corporation by the name of The Merchants and Miners Bank.

Should this evidence be excluded?

The averments in the petition in the Madison county case that the plaintiff was a corporation were immaterial ones. (*Brady v. National Supply Co.*, 64 Ohio St., 267.) These are merely descriptive of the plaintiff and of no more consequence than if the plaintiff's name in the caption read: The Merchants and Miners Bank, a corporation.

The precise question for this court then is: In a suit on a domestic judgment, where it appears that the name of the party plaintiff in the judgment sued on is not identical with the name of the party claiming to have secured the judgment, can parol evidence be received to show that the parties are, in fact, identical? A case can readily be imagined where the admission of such evidence would be absolutely necessary. If the name of the plaintiff in a suit for recovery on a judgment was exactly the same as the name of the plaintiff in the transcript of the judgment sued on, and there was an answer to the effect that they were not the same parties, parol evidence would be imperative. While the authorities are not in accord on the subject the great weight of authority sus-

tains the rule that parol evidence is admissible to prove that the parties are identical. A list of them follows:

State, ex rel. Prescott, Jr., et al. v. Hanousek, 19 C. C., 303; *Missouri Glass Co. v. Gregg*, (Tex.) 16 S. W. Rep., 174; *U. S. Nat. Bank of N. Y. v. Venner*, 172 Mass., 449, 52 N. E. Rep., 543; *Fisher, Brown & Co. v. Fielding*, 67 Conn., 91, 32 L. R. A., 236; *Boyden, Jr., v. Hastings*, 17 Pick., 200; *Morris v. The State, ex rel. Brown*, 101 Ind., 560; *Hollenbeck v. Stanberry & Son*, 38 Ia., 325; *Mobile & Montgomery Ry. Co. v. Yeates*, 67 Ala., 164; *James H. Barry & Co. v. Carothers*, 6 Rich. Law (S. C.), 331; *Stevens v. Elizee*, 3 Campbell, 256; *Farrar v. Fairbanks*, 53 Me., 143, and *Stevellie v. Read*, 2 Wash. C. C., 274.

The rule is well established that where the record of a former action, pleaded as a bar or estoppel, does not show that the parties to such action were identical with the parties to the action in which it is so pleaded, this fact may be established by parol evidence. 23 Cyc., 1542.

Counsel for the receiver say that a suit to recover on a judgment presents an entirely different situation from one in which a former recovery is pleaded, but they do not point out any difference or cite any case as authority for the position that there should be a difference. It seems to us there is no difference. Both cases fall within or without the general rule that parol evidence will not be received to explain, contradict or interpret a judgment. In one case the judgment record is admitted to prove the existence of a cause of action; in the other it is admitted to prove the nonexistence of

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a cause of action. The same record may be introduced to prove the one or the other. Since the same record can be introduced for either purpose, it follows naturally and logically that if parol evidence can be introduced to show identity of parties in one case it may in the other. Suppose Merchants and Miners Bank, a partnership, had brought another suit on the cognovit notes sued on in Madison county and had served process upon The Nelsonville Foundry & Machine Company, and the latter had answered and pleaded *res adjudicata*, and offered in evidence a transcript of the judgment of the first suit, and it was objected to for the same reason that it is objected to in this suit, what difference would there be in the assumed case and the one under consideration? If it be admitted that the transcript of the judgment would be admissible in the assumed case, and that the identity of the parties could be proven by parol evidence, what reason can be assigned for excluding such evidence in the case under consideration? We are wholly at a loss to discover any reason, and conclude that the authorities which support the position that parol evidence may be received to identify the parties in a case where a former recovery is pleaded are precisely in point in an action where it is sought to identify parties in a suit on a domestic judgment. The judgment record and the oral evidence were properly admitted.

It is contended that The Nelsonville Foundry & Machine Company did not authorize the warrants of attorney contained in the several promissory notes, and that therefore the court of common

pleas of Madison county did not have jurisdiction of the person of such company. It is true that the only authority extended by the directors was to make notes to cover overdrafts, except in the case of the note for \$10,000 where no authority whatever was given by any positive act of the directors acting as such. However, the two notes for \$1,000 each, dated August, 1892, had been existing contracts between Merchants and Miners Bank and The Nelsonville Foundry & Machine Company for eighteen years before they were reduced to judgment. The note dated February 6, 1897, and the one dated October 16, 1897, had been existing contracts between the same parties for thirteen years before they were reduced to judgment. During that entire time the company had paid interest on the notes. The notes executed in August, 1892, were signed by Charles A. Cable, President, and C. E. Poston, Secretary-treasurer. The note dated February 6, 1897, was signed by J. W. Jackson, President, and C. E. Poston, Secretary-treasurer. The note of October 16, 1897, was signed by C. E. Poston, Secretary-treasurer. While the knowledge acquired by Charles A. Cable, as he was one of the partnership composing Merchants and Miners Bank, as to the contents of the notes, might not have been the knowledge of the company, yet C. E. Poston, who signed all four notes and had no interest in such partnership, was secretary-treasurer, and his knowledge of the contents of the notes was the knowledge of the company. Poston was one of the officers authorized by the board of directors of the corporation to execute these notes, and that matter was his especial

business and within the scope of his authority. Knowledge of the officers and agents of a corporation within the scope of their official capacity and agency is the knowledge of the corporation. 2 Thompson on Corporations (2 ed.), Section 1646, and *The First National Bank of New Bremen v. Burns et al.*, 88 Ohio St., 434.

In the case of *Dickinson v. Zubiate Mining Co.*, 106 Pac. Rep., 123, (11 Cal. App., 656), it is held:

"Through the president and secretary who executed a written agreement in a corporation's behalf, it must be deemed to have had notice thereof, when it was made."

"The most comprehensive rule with reference to this subject which can be stated is that notice communicated to, or knowledge acquired by, the officers or agents of corporations when acting in their official capacity or within the scope of their agency becomes notice to or knowledge of the corporation for all judicial purposes." 10 Cyc., 1054.

Another rule equally well established is that:

"A corporation may ratify by passive acquiescence, as well as by affirmative action, the unauthorized acts of its agents, and its acquiescence with knowledge, if continued for a considerable time, operates as a ratification." *Knowles et al. v. Northern Texas Traction Co.*, (Tex.) 121 S. W. Rep., 232. 2 Thompson on Corporations (2 ed.), Section 1407.

All four of the notes could have been taken up long ago and renewals given without the warrants of attorney, if the corporation had any desire to set right the unauthorized acts of its officers, but its acquiescence for so long a time without any

objection whatever deprives the corporation of the right to now say that the warrants of attorney are without its authority. To say that the terms and stipulations contained in notes which have been owed by a corporation for more than thirteen years, and on which the interest has been paid, were unknown to the board of directors as a board, especially when the president and secretary of the corporation, both of whom were directors, signed the notes, is a proposition so much at variance with the ordinary knowledge and duties of corporate officers that it ought not to receive any serious consideration. The further argument that ratification by individual directors is not a ratification by the board is a proposition which would at once destroy the doctrine of ratification by acquiescence, which is well established. Ratification by acquiescence means, ordinarily, ratification without formal action. It means knowledge of the fact without act of any kind in relation thereto for a considerable period of time.

It is further contended that the Madison county court had no jurisdiction of the machine company because a warrant of attorney must be strictly construed, and as Merchants and Miners Bank was in fact a partnership the attorney at law who confessed the judgment in Madison county had no authority to confess a judgment in favor of The Merchants and Miners Bank, a corporation, citing *Spence v. Emerine*, 46 Ohio St., 433; *Mansfield Savings Bank v. Post et al.*, 22 C. C., 644, and other cases of like import.

It will be noticed that the payee in the notes referred to is Merchants and Miners Bank. If

attention is directed solely to the record in the Madison county case the notes were strictly construed when judgment was entered for Merchants and Miners Bank, because it was the payee and obligee named in the notes. Whether it was a corporation or not can not be determined by the notes, because they are silent as to that matter, and as Merchants and Miners Bank must necessarily have been either a corporation or partnership, an individual or individuals doing business in that name, there is nothing in the record in that case to show that in giving judgment for Merchants and Miners Bank, a corporation, the judgment was not given in strict accord with the terms of the notes. It is only when we go outside the record of the Madison county case that any reason can be found for saying that the notes were not strictly construed and judgment given for a party who was not entitled to it. It is only when the record in the instant case comes into view that the authority of the attorney at law who confessed the judgment can be questioned. So the whole matter is reduced finally to whether oral evidence can be received to show that the plaintiff in the Madison county judgment was identical with Merchants and Miners Bank, a partnership. If it can, as we have decided, then it at once appears that the judgment was confessed in favor of Merchants and Miners Bank, a partnership, for it was in fact the plaintiff in that suit.

The note for \$10,000 was given within a month before it was reduced to judgment, and was signed: The Nelsonville Foundry & Machine Company, C. A. Cable, President, R. H. Jackson,

Secretary. The board of directors was not in session a single time in a period of almost five years prior to the appointment of a receiver for the machine company, the last meeting being April 29, 1909, and the records further show that outside of the annual meetings, at which times they elected officers, the board of directors did not perform a single act relating to the business of the corporation after some time in 1904. R. H. Jackson, since prior to 1909, has been secretary-treasurer and general manager of the corporation, and made the following statement at the trial in the court of common pleas:

"Would you mind if I would tell you that the directors and the stockholders in their yearly meeting would say they would turn over a new leaf every year, 'now, we will get together and we will have meetings, regular meetings, and will look after business a little bit closer and will help you out,' and that is the last I would hear of them until the next meeting."

But the next meeting after April 9, 1909, never came. So that for a period of almost five years prior to the appointment of the receiver on March 24, 1914, the board of directors never met. They ceased to direct the corporation and as directors became dormant. R. H. Jackson was the only officer connected with the corporation who was compensated. The business was being conducted at a loss. The directors were not interested. They, by their acquiescence, allowed the business to be conducted by Mr. Jackson, and he had entire charge of the same during the period of five years. The stockholders present at the annual meeting in

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1906 were C. A. Cable, Fred Weymueller, representing stock of I. O. O. F., H. H. Jackson and R. H. Jackson. Those present at the annual meeting in 1907 were the same persons and C. Robbins. Those present at the annual meeting in 1908 were Cable, Robbins, Weymueller and R. H. Jackson. Those present at the annual meeting in 1909 were Cable, Robbins, H. H. and R. H. Jackson. Those present at the annual meeting of August 22, 1912, were Cable, Robbins, H. H. and R. H. Jackson, and two persons representing stock of the I. O. O. F. So since 1906 the stockholders who attended the annual meetings were Cable and Robbins, both interested in Merchants and Miners Bank, the two Jacksons, and representatives of the stock of I. O. O. F., and of these Cable and the two Jacksons owned five-sixths of the stock.

Nor did the stockholders hold a meeting during that five-year period, except on the one occasion, August 22, 1912, when they elected the old board of directors, being the same persons, with one exception, who did not meet during the five-year period. So the stockholders acquiesced in the action of the directors in allowing Mr. R. H. Jackson to manage and control the business of the company.

At the time of the execution of the \$10,000 note, on December 21, 1910, the directors had not met for one year and seven months, and the stockholders were allowing the general manager, Mr. R. H. Jackson, to assume and exercise the powers of the board of directors. Their attitude in the matter is clearly seen by the reelection of the same directors in 1912, with the single exception. This

shows that they, the stockholders, were willing that the single officer should assume the duties of the board of directors, for they knew the board of directors was such only in name.

In 2 Thompson on Corporations (2 ed.), Section 1409, it is said:

"Generally where the stockholders, by their direction or acquiescence, invest the executive officers of the company with the powers and functions of the board of directors, as a continuous and permanent arrangement, the board being entirely inactive, and the officers discharging all its duties, a transaction consummated in behalf of the corporation by such officers will be valid, though not specially authorized by any vote of the stockholders or directors."

In the case of *The Smead Foundry Co. v. Cheshbrough*, 18 C. C., 783, cited so frequently by counsel for the machine company, the fourth paragraph of the syllabus reads, in part, as follows:

"The president of a corporation has no power by virtue of his office to execute a bond and warrant of attorney for the entry of judgment by confession against the corporation. Such power is vested in the board of directors only. But the president's authority may be enlarged beyond the powers inherent in his office *by the consent and acquiescence* of the directors in permitting him to take control of the business of the corporation."

The evidence shows beyond dispute that the stockholders permitted the directors to surrender their offices to the general manager for a period of five years. The note of December 31, 1910, was executed nineteen months after the board of

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directors ceased to meet and as a board became defunct. The act of R. H. Jackson in signing the \$10,000 note was the act of the corporation. R. H. Jackson had succeeded to the power of the board of directors. They could have executed a judgment note to the bank on December 31, 1910. Hence, under the circumstances, he could. The note of December 31, 1910, was beneficial to the machine company, and it can not now say, under the circumstances as appear beyond dispute in the evidence, that the warrant of attorney contained in that note was without the authority of the company.

Does the failure to aver in the Madison county petition that the plaintiff was a partnership formed for the purpose of carrying on a trade or business in Ohio render the judgment void?

In *J. H. Beers & Co. v. Gurney*, 14 C. C., 82, the court held that where the defendant fails to take advantage of such failure by proper pleading the objection is waived. The case under consideration, however, is different from that one, in that the judgment here in controversy was taken on confession and the defendant had no opportunity to make any objection. However, the Madison county court of common pleas had jurisdiction of the parties and of the subject-matter, and the petition therein was such a one as could have been amended, and the proper averment made, as the record (outside the judgment record) shows that Merchants and Miners Bank was a partnership formed for the purpose of doing business in Ohio.

As said in *Spoors v. Coen*, 44 Ohio St., 497, 503:

"If the case presented invoked the jurisdiction of the court, and could have been perfected by amend-

ment, the judgment of the court thereon could not be treated as a nullity."

An amendment could have been made showing the plaintiff had legal capacity to sue in the Madison county case. Besides, the waiver of errors in the warrant of attorney would seem to be sufficient to waive just such an error as this. We have no doubt that had the defendant joined issue on some other averment in the Madison county case, without raising any objection to the failure to aver that the plaintiff was a partnership formed for the purpose of carrying on business in Ohio, and the plaintiff had recovered a judgment, that judgment would be valid. If this is true, and the error could be waived under such circumstances, it was waived by the language of the cognovit note.

The decree will be in accordance with this opinion.

Decree accordingly.

WALTERS and MERRIMAN, JJ., concur.

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THE JOSLIN-SCHMIDT CO. v. THE BALTIMORE &
OHIO SOUTHWESTERN RAILROAD CO.

Average agreement—Car demurrage rules—Act of God—Flood of March, 1913—Liability for demurrage charges—Consignee not liable, when.

1. The flood of March, 1913, has been many times held to have been an "act of God," and in the absence of any stipulation that it was, courts in the Ohio and Miami valleys may take judicial notice to that effect.
2. Car demurrage rules which refer to the bunching of cars and to the delivery of same in accumulated numbers in excess of daily shipments, as the result of the act or neglect of any railroad, do not apply where the bunching of cars and consequent delivery in accumulated numbers are due to an "act of God." An agreement by which a shipper or receiver waives his right to cancellation or refund of demurrage charges under such rules does not govern when the delay was due to the flood of March, 1913, and not to the act or neglect of any railroad.

(Decided February 28, 1916.)

ERROR: Court of Appeals for Hamilton county.

Mr. David S. Oliver, for plaintiff in error.

Messrs. Harmon, Colston, Goldsmith & Hoadly,
for defendant in error.

JONES, E. H., P. J. In this action a petition in error is filed to reverse a judgment of the superior court of Cincinnati, in which court the case was submitted, without pleadings or process, on an agreed statement of facts in accordance with the provisions of Section 11472, General Code. Upon the agreed statement of facts the superior court,

being of the opinion that plaintiff below, The Baltimore & Ohio Southwestern Railroad Company, was entitled to recover, rendered judgment for plaintiff. The question presented to us, therefore, is purely one of law.

The railroad company by the proceeding below recovered a judgment against The Joslin-Schmidt Company for \$364, with interest, such sum having been found by the court upon the agreed statement of facts to be due the railroad company for demurrage charges which were made by the railroad company against the consignee for failure to unload its cars within the prescribed time.

It appears that the railroad company had published, in accordance with law, a set of "Car Demurrage Rules," a copy of which appears as "Exhibit A" attached to the agreed statement of facts. From these rules it appears that the railroad company, in order to encourage the speedy unloading of cars, offered to enter into an agreement with consignees by which they should receive credit for cars unloaded within 24 hours, instead of using the 48 hours free time allowed under demurrage rules. Such an agreement had been entered into between the parties to this action, and a copy of same is attached to the agreed statement of facts as "Exhibit B."

We now quote the following from the agreed statement of facts:

"Thereafter, during the months of April, May and June, 1913, there were shipped to the defendant, over the lines of the Chesapeake & Ohio Railroad Company, the Louisville & Nashville Rail-

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road Company, and other railroad companies, various shipments of coal and other commodities; the dates of the shipment of the same, the dates of the arrival of the same at Cincinnati, the dates when the same were constructively placed in accordance with the terms of said tariff, the dates when the same were actually placed, and the dates when the same were released, will all appear by the tabular statement which is hereto attached, marked 'Exhibit C,' and made part hereof with the same force and effect as if the same were herein set out at length.

"The said cars were bunched in transit or at destination, and were delivered by plaintiff in accumulated numbers in excess of daily shipments, but the said bunching did not occur through any fault of any railroad, the same having been caused wholly by the conditions created by the flood of March, 1913, and the confusion and delay of traffic incident thereto and to the results thereof."

By paragraph 2 of Section B of Rule 8 of said "Car Demurrage Rules" it is provided:

"2. Cars for unloading or reconsigning. When, as the result of the act or neglect of any railroad, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by this railroad in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to railroad company's agent within 15 days."

By virtue of this provision in the Car Demurrage Rules there would have been no liability for demurrage charges in this case, but by the provisions of the so-called "Average Agreement" entered into by these parties this exemption from demurrage was waived on the part of The Joslin-Schmidt Company by the following language:

"(c) A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under Section A, paragraphs 1 and 3, or *Section B of Rule 8.*"

So it will be seen that if the "bunching of cars" in the yards at Ivorydale had been admittedly due to any act or neglect of any railroad company The Joslin-Schmidt Company would be bound by the paragraph above quoted from the "Average Agreement," by which it waived any exemption from the provisions of the car demurrage rules. But the cars for which demurrage is here claimed arrived in bunches, sometimes at the rate of six or seven a day, and in many instances over a month after they were billed or shipped. They came in without any reference to the order in which they were shipped, without any rule or regularity, and in numbers far in excess of the capacity of the private track used by The Joslin-Schmidt Company for unloading.

This claim for demurrage, it might be added, is largely based upon the constructive placement rule, which will be found designated as "Rule 5" in the "Car Demurrage Rules," which reads as follows:

"RULE 5.

"PLACING CARS FOR UNLOADING.

"(a) When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks cannot be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The railroad company's agent must give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement."

After careful examination of the rules and agreements binding these parties, which are above briefly referred to, we are of the opinion that there is an absence of any obligation express or implied upon The Joslin-Schmidt Company to pay these demurrage charges. Paragraph 2 of Section B of Rule 8 of the Car Demurrage Rules, above, is limited in its effect to bunching occasioned by the act or neglect of some railroad company; therefore it is only a situation thus created that can be affected by the express waiver contained in the Average Agreement. The agreed statement of facts herein expressly removes this case from the control of said provisions. The parties have stipulated, as shown above, that these cars were delivered "in accumulated numbers in excess of daily shipments, but the said bunching did not occur through any fault of any railroad, the same having been caused wholly by the conditions

created by the flood of March, 1913, and the confusion and delay of traffic incident thereto and to the results thereof." This is the only reference in the agreed statement of facts to the flood of 1913, and it is not expressly stated here that said flood was an "act of God," but the stipulation that the delay and confusion and the bunching were wholly caused by the flood is equivalent to saying that the situation was created by an agency over which neither the parties nor any earthly power had any control.

We think, therefore, that we are justified in holding upon the agreed statement of facts that the delays in shipment and the so-called bunching of cars were an "act of God." The flood of March, 1913, has been many times held to have been an "act of God," and in the absence of any stipulation that it was we are inclined to think that courts in the Ohio and Miami valleys may take judicial notice to that effect. The delays through "act or neglect of any railroad," referred to in the Car Demurrage Rules, are manifestly such delays as a derelict company might be made to respond to in damages, but the delays we are called upon to consider in this case are not such as they. Such delays as occurred from this flood are nowhere mentioned in the rules or in the accompanying agreement, and there is nothing to show that delays occasioned by an "act of God" were in contemplation of the parties. It would be a harsh rule which would relieve one party on account of "an act of God" and at the same time permit it to penalize the other on account of delay and damage resulting from the same cause.

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For the reasons thus briefly stated the judgment will be reversed, and judgment entered here for plaintiff in error.

Judgment reversed, and judgment for plaintiff in error.

JONES, OLIVER B., and GORMAN, JJ., concur.

PAGEL v. CREASY ET AL.

Agency—Interest of agent in subject-matter of sale—Agent may not earn profit outside regular compensation—Without knowledge and consent of both principals.

An agent employed to sell cannot purchase for himself either directly or indirectly, nor can he have any interest in the subject-matter of the sale. The law does not suffer one who is an agent of a vendor to have any interest in a contract of sale or to earn any profit thereby outside of his regular compensation, unless it is done with the knowledge and consent of both principals.

(Decided February 14, 1916.)

ERROR: Court of Appeals for Hamilton county.

Mr. Sherman T. McPherson, for plaintiff in error.

Messrs. Mackoy & Mackoy, for defendants in error.

GORMAN, J. The plaintiff in error brought an action to recover from defendants in error the sum of \$822.62, with interest from the 1st of November, 1913, being the amount of one-half the profits

which the plaintiff claimed resulted to the defendants upon the purchase and sale of 1,000 barrels of sugar.

In his petition the plaintiff claimed that he entered into a contract with the defendants, whereby he sold to them 1,000 barrels of sugar from the Warner Sugar Refining Company at the then market price of \$4.20 a hundred pounds, New York basis, the delivery of the sugar to be held off as long as possible, and that the defendants agreed with him to sell the sugar, bought as aforesaid, and that the profits or losses derived from the purchase and sale of said sugar, as aforesaid, should be equally divided between said defendants and the plaintiff. He further says that in pursuance of the agreement sugar was shipped to said defendants at various times during the summer of 1913, aggregating 1,000 barrels, and that said sugar was sold by the defendants at a total profit of \$1,645.24, one-half of which, \$822.62, he claims belongs to him under the contract.

Defendants by answer set up that the plaintiff, Pagel, was the selling agent of the Warner Sugar Refining Company at the time the sale of the thousand barrels of sugar was made to them; that they did buy from the Warner Sugar Refining Company through the plaintiff a thousand barrels of sugar at the then market price of \$4.20 per hundred pounds, deliveries to be delayed as long as possible; and that said sugar was sold to them in the usual course of business. The defendants denied that the profit on the said thousand barrels of sugar was \$1,645.24. And, further answering, the defendants stated that if they entered into

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an agreement on May 2, 1913, with the plaintiff for the purchase by plaintiff and defendants of the said thousand barrels of sugar from said Warner Sugar Refining Company, or agreed or had agreed on or about that date with the plaintiff that the defendants should sell the said sugar so purchased from the said company and that the profits and losses derived from the sale thereof should be equally divided between the plaintiff and defendants as set forth in the petition, said agreement and each and every part thereof was and would have been contrary to public policy, illegal, void, and of no binding force or effect, because on said date, and for some time previous thereto and thereafter, plaintiff was a sales agent in the city of Cincinnati and state of Ohio for said Warner Sugar Refining Company, selling sugar for his said principal on a commission basis for each barrel sold; that, representing himself to be the sales agent of the said company, and the defendants believing him to be such, plaintiff had solicited an order for and on behalf of said principal for said sugar, and defendants had bought the said sugar from the said company through the plaintiff acting as its said sales agent, but said purchase was made solely for the account of defendants and plaintiff had no interest whatever therein with defendants, as purchaser or otherwise, but plaintiff as said sales agent was paid and received the usual commission from his said principal, the Warner Sugar Refining Company; and that plaintiff was not authorized, empowered or permitted to become a purchaser in whole or in part of said sugar, and, if said plaintiff had acquired or had any interest

in the purchase or sale of said sugar except as sales agent of the Warner Sugar Refining Company, it was without the knowledge or consent of his principal or these defendants. Defendants, therefore, asked to be dismissed with their costs.

A demurrer was filed to the second defense, which set up the agency of the plaintiff and that he was not authorized to acquire an interest in the purchase of said sugar. This demurrer coming on to be heard was sustained by one of the judges of the common pleas court, upon the theory that there was no double agency in the case.

Thereafter an amended answer was filed, in substance setting up the same defense.

When the case was called for trial, plaintiff obtained leave to file an amended petition setting out practically the same state of facts as in the petition, but alleging that the agreement as to profits was as follows:

"That the said defendants, Edwin K. Creasy and Llewellyn V. Creasy, and plaintiff should divide equally the profits to be made by the advance in the price of sugar in the market, or if the same declined the losses should be divided equally between them, the gain or loss to be based on the price of said sugar on the date of delivery of same to the said defendants."

This part of the amended petition differed from the petition in that in the petition it was claimed that the plaintiff and the defendants were to divide the losses or profits which might result from the resale of the sugar, without reference to the market price.

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A second amended answer was filed to this amended petition, which in substance set up the facts set out in the original answer.

It appears from the statements of counsel that when this case was called for trial, the trial court was of the opinion that the demurrer filed to the second defense of the answer should have been overruled, and, after a conference with the judge who sustained the demurrer, the trial court overruled the demurrer. The record fails to show that any demurrer was filed to the second amended answer or to the amended answer, and the record also fails to disclose that any entry was made on the day that it is claimed that the demurrer was overruled by the trial court.

The case was heard on March 25, 1915, and upon that day it is claimed that the trial court overruled plaintiff's demurrer to the second defense of the answer. Long after the case was heard and the verdict and judgment rendered in favor of the defendants, to-wit, on May 11, 1915, an entry appears upon the journal setting forth that the demurrer of the plaintiff to the second defense of defendants' amended answer was argued and overruled, to which ruling of the court the plaintiff by his counsel excepted. The minutes state, 619, "Entry *nunc pro tunc*," but the record fails to show on what day this entry should have been made. It was made on May 11, but as "*nunc pro tunc*," and there is an absence in the record of the date when the action was really taken by the court.

The plaintiff in error complains that the trial court should not have overruled the demurrer to the amended answer, but should have abided by the

ruling of the former judge who sustained the demurrer to the second defense of the answer.

We are of the opinion that the plaintiff in error was not prejudiced by the ruling of the trial judge in this matter. When it is considered that the court of common pleas of Hamilton county is one court, notwithstanding the different individuals who sit upon the bench of that court, and when it is further considered that it is not material what particular judge rules upon an interlocutory matter, it is the ruling of the common pleas court; the individual judge who tries a case has a right at the time the final judgment is rendered to correct any errors of law that may have been made in any interlocutory orders or rulings, whether they have been made by himself or by any other judge of the common pleas court.

The right so to rule seems to have been established in several cases heard in the common pleas court, affirmed by the circuit court and by the supreme court.

The main question, however, is whether or not the plaintiff had a right to recover under the facts shown in this case. He was an agent of the Warner Sugar Refining Company. The evidence shows that he was the sole selling agent in Cincinnati for that company; that no broker or agent could place an order with the Warner Sugar Refining Company for the sale of any sugar in the Cincinnati territory except the plaintiff. The evidence further discloses that his principal, the Warner Sugar Refining Company, had no knowledge of the alleged agreement made by the plaintiff with the defendants to divide the profits and losses arising

from the purchase and sale of the thousand barrels of sugar. The record further discloses that the plaintiff received his regular commission for the sale of the thousand barrels of sugar to the defendants.

We think the law is well settled in this state that an agent employed to sell cannot purchase for himself, either directly or indirectly, nor can he have any interest in the subject-matter of the sale. The law does not suffer one who is an agent of a vendor to have any interest in a contract of sale, or to earn any profit thereby outside of his regular compensation, unless it is done with the knowledge and consent of both principals. This rule of law we think is clearly stated in the cases of *Bell v. McConnell*, 37 Ohio St., 396, and *Peckham Iron Co. v. Harper*, 41 Ohio St., 100.

Mr. Pagel was a sales agent in Cincinnati of the Warner Sugar Refining Company. Whether he was, or whether he was not, he was a broker and undertook to sell the sugar of the Warner Sugar Refining Company. He could not enter into any engagements which would subject him to a temptation to fail to serve his principal to his utmost capacity.

In the case above cited, *Bell v. McConnell*, the court, among other things, said at page 399:

"This case presents the single question: Can a real estate broker, who assumes to aid both contracting parties in making an exchange of real estate, recover compensation for his services from either, upon an express promise to pay, in a case where each principal had full knowledge of and assented to the double employment?"

The court proceeds to say:

"It has been decided (*Rupp v. Sampson*, 16 Gray, 398, and *Siegel v. Gould*, 7 Lans., 177), and is not doubted, that such broker may recover from both or either where his employment was merely to bring the parties together; and it is equally clear, both upon principle and authority, that in case of such double employment he can recover from neither, where his employment by either is concealed from or not assented to by the other. Several reasons may be given for this rule. In law, as in morals, it may be stated that, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke, 16, 13. Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion."

Indeed, it may be stated that the rule does not depend upon whether or not the principal is injured by the conduct of the agent. The wholesome rule is that the agent shall not put himself in a position where he may be tempted to betray his principal or to serve himself at the expense of his principal.

In *Peckham Iron Co. v. Harper, supra*, the court, on page 108, says:

"It is a fundamental rule, that an agent employed to sell cannot be a purchaser, unless he is known to his principal to be such; nor is the rule inapplicable or relaxed when the employment is to sell at a fixed price. *Ruckman v. Bergholz*, 37 N. J. L., 437. The law will not suffer one to earn a profit, or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same

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time, in the double capacity of agent and purchaser. *Church v. Marine Ins. Co.*, 1 Mason, 341."

Many authorities might be cited to emphasize the rule above laid down. Suffice it to say that Pagel was a sales agent of the Warner Sugar Refining Company, and as such it was his duty to serve his principal, and he could not enter into a contract with the defendants or other proposed purchaser whereby he, Pagel, would make a profit upon the sale or resale of the sugar, without a full and fair disclosure to his principal, the Warner Sugar Refining Company. The law does not aid either of the parties who enter into such a contract as this. It leaves them where it finds them. Neither the plaintiff nor the defendants could enforce or recover under such a contract as is claimed by the plaintiff to have been entered into in this case. The law is not partial in favor of the defendants who refuse to pay after the profits are made, but, as has been stated, on the grounds of public policy the law refuses to give assistance to either of the parties who make a contract which is utterly void on the grounds of public policy.

In this view of the case it is immaterial whether or not the trial court reversed the judgment which had been rendered on the demurrer prior to the trial. The sole question is whether or not the demurrer to the second defense of the answer should have been sustained or overruled, and we are clearly of the opinion that the demurrer should have been overruled.

Furthermore, it appears in this case that plaintiff's contract was made with one of the defendants, who were partners, whereby he claims to have

made an agreement under which he was to share in the profits of the business of the defendants. There is no evidence that the other partner consented to this agreement, and surely a partnership, even for a single transaction, could not be entered into between the plaintiff and one defendant without the consent of the partner of such defendant.

Without considering the other questions involved in the case, we think, for the reasons stated, that the judgment of the trial court in instructing the jury to return a verdict in favor of the defendants was correct, and the judgment will be affirmed.

Judgment affirmed.

JONES, E. H., P. J., and JONES, OLIVER B., J.,
concur.

THE STATE, EX REL. WOOLERY ET AL., v. BRENNER ET AL.

Constitutional law—District tuberculosis hospital act—Discretion of joint board not subject to control by the courts—Tuberculosis hospital building not a nuisance per se—Right of owner whose lands are about to be taken for public purpose.

1. The district tuberculosis hospital act is constitutional.
2. The joint board created by such act is invested with a discretion which cannot be controlled by the courts, at least in the absence of fraud or gross abuse of discretion.
3. The location and construction of a tuberculosis hospital building does not constitute a nuisance *per se*.
4. An owner whose lands are about to be taken for any public purpose, without such owner being made a party to the condemnation proceedings and without compensation first being made, is entitled to have relief by way of injunction to protect his property.

(Decided June 20, 1916.)

APPEAL: Court of Appeals for Montgomery county.

Mr. J. A. Kerr and Mr. J. A. Sharts, for plaintiffs.

Mr. D. W. Iddings; Mr. Robert C. Patterson; Mr. P. A. Saylor and Mr. Robert R. Nevin, for defendants.

FERNEDING, J. This case is presented on demurrer to the second amended petition. The case involves important questions which have been thoroughly and ably argued by counsel on both sides. Some questions have been presented involving procedure, but we have gone to the merits of the case as presented by the petition.

We do not consider it necessary to go into detail, but will content ourselves with merely announcing our conclusions upon the controlling questions of the case.

In respect to the constitutionality of the law, we feel bound by the decision of the supreme court in the case of *Brissel et al. v. State, ex rel.*, 87 Ohio St., 154, and other cases which the supreme court has had occasion to consider and in which it has been held that the Tuberculosis Hospital Act is constitutional.

The counsel for plaintiffs refer to the exemption of municipalities containing a tuberculosis hospital, but we think that even if this question was not in the former cases presented to the supreme court, there would be a sufficient reason for the exemption of municipalities which had already provided a tuberculosis hospital. Whether tuberculosis patients of a municipality could find their way, by the process described in argument, through the county infirmary into the district hospital, we are not called upon to express an opinion at this time.

In any event, as we are advised, this provision exempting municipalities having a tuberculosis hospital was introduced by amendment passed April 17, 1913 (103 O. L., 492, 494), and if that feature is unconstitutional, it would go to the validity of the amendment rather than to the validity of the entire act.

We, therefore, hold that the act, so far as involved in the present case, is constitutional.

We are also of opinion that the joint county board is invested with a discretion which cannot be controlled by the courts, at least in the absence of

fraud or gross abuse of discretion, and we do not consider that the facts stated in the second amended petition are such as to constitute either fraud or gross abuse of discretion.

The statutes have expressly authorized the location and construction of tuberculosis hospitals, and we do not think that we are justified, even under the averments of the second amended petition, in holding that the location and construction of the hospital building constitute a nuisance *per se*. The nuisance, if any, contemplated by the second amended petition, must be held to be one growing out of the operation of the hospital and the question is, therefore, premature at this time. If the hospital should be operated in the manner shown by the averments of the petition, it would be ample time for a court to enjoin when such careless and negligent operation of the hospital should be demonstrated.

In respect to the contention that there is no money in the treasury available for the purchase of the property, we think this is insufficient for two reasons: First, the petition does not show that there is any money in process of collection, and, second, the statute would apply at the time when the joint board condemned the property and is about to expend the county funds for the purpose of paying the purchase price. The property can not be taken until the compensation is actually paid.

There are other objections, made in the first and second causes of action, to the condemnation of the property and the location and construction of the tuberculosis hospital, but we think none of these are sufficient to sustain an injunction.

The third cause of action seeks to prevent the joint board of trustees from appropriating certain real estate, in which the plaintiff has an interest, for a right of way and easement, without making or allowing plaintiffs to be made parties to the condemnation case and without first making compensation therefor.

Counsel for defendants claim the fact to be that both Woolery and Ratcliff are made parties defendant in the condemnation case; but we are bound by the averments of the petition. While the plaintiff Woolery does not very clearly assert that he and Ratcliff were not parties, yet the inference to that effect from the petition is sufficiently clear.

The petition avers that the right of way in controversy, "Is sought to be appropriated by said condemnation proceedings without making or allowing this plaintiff or said Alonzo Ratcliff to be made parties thereto."

There is a further averment that: "Plaintiff has heretofore applied to said court of common pleas Alonzo Ratcliff is a party to the condemnation proceedings and said court overruled said motion and refused to allow plaintiff to plead therein."

We think the necessary inference from these averments is that neither the plaintiff nor said Alonzo Ratcliff is a party to the condemnation proceedings. The case is, therefore, according to the petition, one in which the joint board of trustees are about to appropriate a certain right of way over the lands of the plaintiff, without his being made party to the condemnation proceedings and without first making compensation to plaintiff for his interests in the property about to be taken.

App.] C., N. O. & T. P. Ry. Co. v. Union Gas & Elec. Co.

We think it is familiar law that an owner whose lands are about to be taken for any public purpose, without such owner being made a party to the condemnation proceedings and without compensation first being made, is entitled to have relief by way of injunction to protect his property.

It therefore follows that the demurrer to the first and second causes of action should be sustained and to the third cause of action overruled.

Decree accordingly.

KUNKLE and ALLREAD, JJ., concur.

THE CINCINNATI, NEW ORLEANS & TEXAS PA-
CIFIC RY. CO. v. THE UNION GAS &
ELECTRIC CO.

*Vacation of street—Conditional order of vacation—Rights as to
existing gas mains—Change in grade of street after vacation
—Cost of changing location of gas mains.*

When a city street in which a gas main has been placed with the consent of the city is vacated by order of court at the petition of the owner of all the abutting real estate, upon the condition that such owner will at all times permit the company owning the gas main to enter upon the vacated street for the purpose of laying, keeping in repair, changing or removing its main, and such owner thereafter finds it necessary to change the grade of the vacated street, the owner is not liable to the company owning the gas main for the cost of changing the location of the main to conform to the new grade.

(Decided March 6, 1916.)

ERROR: Court of Appeals for Hamilton county.

C., N. O. & T. P. Ry. Co. v. Union Gas & Elec. Co. [6 Ohio

Messrs. Harmon, Colston, Goldsmith & Hoadly,
for plaintiff in error.

Mr. Miller Outcalt, for defendant in error.

JONES, E. H., P. J. This action was brought by The Union Gas & Electric Company to recover from The Cincinnati, New Orleans & Texas Pacific Railway Company the sum of \$2169.12, expended by it, the gas company, in lowering or changing the location of its large gas main in the yards of the railway company.

Prior to May 18, 1892, there was a street in Cincinnati known as Dalton avenue; and in the year 1894 the gas company, with the consent of said city, laid a 24-inch gas main in that street. On May 18, 1892, plaintiff in error, being the owner by virtue of perpetual leases with privilege of purchase of all the property abutting on both sides of Dalton avenue between Hopkins and Kenner streets, filed a petition in the court of common pleas for the vacation of Dalton avenue between Hopkins and Kenner streets. The prayer of the petition was granted by said court on November 26, 1902. The court, as a condition upon which the order of vacation would be made, required the plaintiff in error to agree that it would "at all times permit The Cincinnati Gas Light & Coke Company, its successors and assigns, to enter upon the said vacated street or vacated parts of streets for the purpose of laying, keeping in repair, changing or removing its system of gas mains and pipes, in the streets or parts of streets vacated."

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In the year 1903 the plaintiff in error graded that part of Dalton avenue which had been vacated, and laid tracks across it. These tracks were laid in close proximity to the top of the gas main above described. In fact, the rails of one of the tracks were resting on said main. This condition so remained until August, 1910, when defendant in error made discovery thereof and made a demand on the plaintiff in error to change the location of the pipes. This the plaintiff in error refused to do; and the gas company then did the work it deemed necessary and demanded that the railway company pay the expenses thereof. This was refused, and this suit was filed in the court below on February 15, 1912, to recover the expenses of doing that work.

There were two defenses set out in the answer: the first admitting certain allegations of the petition, and then making general denial of the remaining allegations; the second setting up the four-years statute of limitations.

Prior to the vacation of this portion of Dalton avenue, while it was still under the control of the city, there could have been no question about the right of the city to change the grade of the avenue, and, likewise, no question but that the gas company would have had to bear all expenses of removing, lowering or raising its pipes, made necessary by such change in the grade of the street. See *Columbus Gas Light & Coke Co. v. Columbus*, 50 Ohio St., 65. We quote from proposition 2 of the syllabus:

"A gas company laying its pipes in the streets

of a city, under a grant from the city, in conformity with an established grade, does so subject to the right of the city to change the grade of the street whenever the necessities of the public require it, and, in the absence of wantonness or negligence on the part of the city, the company cannot maintain an action for damages occasioned by the necessity of taking up and relaying its pipes in order to accommodate them to the new grade."

It follows that had the grade of Dalton avenue been changed by the city of Cincinnati before the decree for vacation, the gas company would have been compelled to change the location of its pipes and to bear the expense thereof.

By the terms of the court's decree vacating the avenue the right to maintain the pipe therein is made secure; without such provision in the entry, said right would have then terminated. The manifest purpose of the court was to protect as far as possible such rights as the gas company then had. It was powerless to do more. There was no attempt on the part of the court to enlarge the rights of the gas company, and it is not claimed that any additional right followed the decree or inured to defendant in error under favor of statutory provision or by operation of law. The railway company being the owner of all the property abutting on both sides of the vacated street became the owner and was entitled to the possession of the part vacated, with the right to use for yard purposes in the same manner and as completely as it could use its contiguous property, subject only to the rights of the gas company as they then and theretofore existed.

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No question enters this case as to the necessity or reasonableness of the grading done by the railway company. The presumption to which it is entitled — that its plans were adopted in good faith and the work carefully done — has not been assailed in any way.

Neither is there any question in this case but that the gas company was justified in looking upon the proximity of the rails to its pipe, and the operation of locomotives and cars over same, as a menace to its business, its patrons and the public. But this condition was brought about by reason of a necessary change of grade, and a rightful, lawful use of its property by plaintiff in error, and we know of no rule of law that would compel the railway company, in the absence of an agreement, to bear the expense incurred in changing the location of the pipe.

The question of the statute of limitations is discussed in the briefs. It is claimed by the railway company that this action accrued in 1903 when the track was laid, which if true would be a bar. The gas company claims that the operation of the cars over the tracks as laid constituted a continuing trespass and that the statute did not begin to run until the change was made in the location of the pipe and the cost of same ascertained and paid.

Having found that no cause of action ever arose, we do not deem it necessary to determine this question. From such consideration as we have given the matter we are inclined to think that the action is barred.

For the reasons stated the judgment of the court

below is reversed, and the judgment which that court should have rendered will be entered here.

Judgment reversed, and judgment for plaintiff in error.

JONES, OLIVER B., and GORMAN, JJ., concur.

ROGERS, A TAXPAYER, v. THE CITY OF
CINCINNATI ET AL.

Public officers—City engineer—Additional duties—Additional compensation—Board of rapid transit commissioners—Employment of engineer by such board—Section 4000-18, General Code (106 O. L., 286).

1. A public officer cannot receive any additional compensation by reason of the fact that additional duties are imposed on him or assumed by him, unless the legislature has expressly provided that such additional compensation may be paid.
2. Under the provisions of Section 4000-18, General Code (106 O. L., 286), being the third section of the act providing for the creation of a board of rapid transit commissioners in cities, the board of rapid transit commissioners of the city of Cincinnati at its option may employ an engineer who is not holding a position in the public service of the city of Cincinnati and fix his compensation, or may designate the engineer of the city of Cincinnati as its engineer, but in so doing cannot allow the latter any additional compensation.

(Decided December 2, 1916.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Crosley & Rogers, for plaintiff in error.

Mr. Charles A. Groom, city solicitor, and *Mr. Saul Zielonka*, assistant solicitor, for defendants in error.

GORMAN, J. The plaintiff, John C. Rogers, as a taxpayer of the city of Cincinnati, requested the solicitor of said city to bring an action against the defendants to enjoin the payment to Frank S. Krug of the sum of \$9,000 per annum as engineer for the rapid transit commission. The solicitor refused to bring the action, and thereupon plaintiff in error brought suit against all the parties defendant in error.

The petition sets out that Frank S. Krug was on July 1, 1916, chief engineer of the subdepartment of engineering of the department of public service of the city of Cincinnati, at a fixed salary of \$6,000 per annum; that prior to the first day of July, 1916, said Krug had been appointed by the mayor to his position as chief engineer, in the classified service of the city of Cincinnati, in accordance with the civil service law of the state; it was further averred that the board of rapid transit commissioners on November 29, 1915, had appointed or designated said Krug as its engineer, and that he had acted as its engineer until July 1, 1916, without compensation additional to the salary provided for him as chief engineer of the city; that on July 1, 1916, the said commission appointed or designated said Krug as its chief engineer, at a yearly salary of \$9,000, in addition to the \$6,000 he was then receiving as engineer of the city of Cincinnati in the department of the director of public service, making a total of \$15,000 per annum to be paid him for his services.

The answer of the defendants set up the appointment of the rapid transit commission under the law and the ordinance, and the issuance of

bonds aggregating \$100,000, the proceeds of which were placed at the disposal of the rapid transit commission, and, further, that the people at a special election voted in favor of a bond issue of \$6,000,000 for the construction by the rapid transit commission of the rapid transit railway system and the loop as designated, and for the purchase and condemnation of the necessary land therefor; and also set up all the laws and ordinances affecting the rapid transit commission. The answer admitted the request made of the city solicitor by the plaintiff Rogers to bring suit and the refusal of the solicitor to commence the action; and further admitted practically all the averments of the petition.

The plaintiff filed a demurrer to this answer on the ground that it presented no defense to the plaintiff's petition.

This demurrer was overruled by the court below, and, the plaintiff not desiring to plead further, judgment was entered dismissing the petition at the costs of the plaintiff. To that judgment plaintiff in error prosecutes this proceeding in error to reverse the judgment of the court of common pleas.

Two questions are presented by the record: First. Can the rapid transit commission employ engineers, clerks and employes and fix their compensation? Second. Can Frank S. Krug, while he is the engineer in the department of public service of the city of Cincinnati under fixed compensation of \$6,000 per year, have his compensation increased by the board of rapid transit commissioners by the sum of \$9,000 per year?

The decision in this case must rest upon the construction to be given to Section 4000-18, General Code, which is the third section of the act providing for the creation of a rapid transit commission, found in 106 Ohio Laws, 286. That section reads as follows:

"The board of rapid transit commissioners may employ clerks, engineers, superintendents and such other employes as may be necessary, provided, however, that the chief engineer of the subdepartment of engineering of the department of public service may be the engineer of said board and that the said subdepartment of engineering shall perform such engineering services as may be determined by said board. The superintendents, clerks, engineers, real estate experts, and attorneys of the board shall be in the unclassified service and all other employes shall be in the classified civil service of the municipality."

It is claimed by counsel for plaintiff in error that under this section of the law the rapid transit commissioners have no right to employ the engineer of the subdepartment of public service of the city of Cincinnati and pay him an additional salary. Plaintiff in error does not question the right or power of the rapid transit commissioners to appoint or designate this engineer, Mr. Krug, to be the engineer or chief engineer of the rapid transit commission, but he denies the power and authority of the commission to pay him any compensation in addition to that which he is to receive as the engineer of the subdepartment of public service of the city of Cincinnati, \$6,000.

This court is of the opinion that the contention of the plaintiff in error is correct and that Mr. Krug cannot be compensated by the board of rapid transit commissioners in the sum of \$9,000, or any other sum, in addition to the compensation which is paid to him for services rendered by him as engineer of the subdepartment of public service of the city of Cincinnati. The plain meaning of the language set out in Section 3 of this act is that the board of rapid transit commissioners is given the option or privilege, or right, of *employing* an engineer who is not in the employ of the city or of *accepting* the services of the city's engineer. When the services of the city engineer are accepted by this board of rapid transit commissioners by designating or appointing him as its chief engineer, then manifestly the plain intent and meaning of the statute is that he is to perform duties additional to those which he had theretofore been performing as engineer in the subdepartment of public service in the city of Cincinnati.

The language of the act is that the board "may *employ* clerks, engineers," etc., "provided, however, that the chief engineer of the subdepartment of engineering of the department of public service *may be* the engineer of said board."

This means that the board, if it does not see fit to employ an independent engineer, may call upon and designate the city engineer to be its chief engineer, or its engineer. The act does not provide that the engineer of the subdepartment of engineering of the department of public service *may be employed* by the rapid transit commission, but that he *may be the engineer* of said board; which clearly

indicates the purpose of the legislature not to permit him to be employed with additional compensation or in an independent capacity, but that the rapid transit commission finding the engineer of the city at hand could avail itself of his services.

Manifestly the legislature in so providing had in mind that the engineer of the city of Cincinnati because of his position would be more familiar with the topography of the city and the country through which this system is to be constructed, familiar with the streets and the location of the water mains, gas mains, sewers, conduits, and other underground utilities of the city; that he would have at hand the facilities, the assistants and the means of doing the work perhaps better than any independent engineer; and, furthermore, that because of his position and relation to the city of Cincinnati he could avoid any friction between an outside engineer, who might be employed by the rapid transit commission, and the engineer of the city under the department of public service.

Furthermore, the legislature no doubt had in mind in this provision that it would conduce to economy for the rapid transit commission to call upon the engineer of the city of Cincinnati to perform these services as its engineer and thereby save the compensation of an additional engineer.

It appears to us that by no stretch of language can this section be construed to mean that the rapid transit commissioners were to employ and allow additional compensation to an officer of the city of Cincinnati, who was then under salary under the civil service law and apparently amply paid for the services that he was rendering, in the absence

of any express language in the statute or some other law which would enable them to pay him an additional salary or compensation.

It is elementary law that municipal corporations have such powers and only such as are expressly granted by the legislature, or which are necessarily implied in order to carry into effect the express grants of power. It is the settled law of this state that a public officer elected or appointed cannot receive any additional compensation by reason of the fact that additional duties are imposed on him or assumed by him, unless the legislature has expressly provided that such additional compensation may be paid. (*Anderson v. Commissioners*, 25 Ohio St., 13; *Jones, Auditor, v. Commissioners*, 57 Ohio St., 189; *Swartz v. Commissioners*, 54 Ohio St., 669, and *Debolt v. Trustees of Cincinnati Tp.*, 7 Ohio St., 237.) There is no provision in this act, or in any other statute brought to our attention, whereby additional compensation may be paid to the engineer of the city of Cincinnati if he be designated or appointed by the board of rapid transit commissioners as its chief engineer.

In view of the fact that this third section of the act under consideration provides that the subdepartment of engineering of the city shall perform such engineering services as may be determined by the board of rapid transit commissioners, it would be just as reasonable to claim that this board would have the power and authority to give additional compensation to all the employes of the subdepartment of engineering of the city of Cincinnati as to give additional compensation to the chief engineer, Mr. Krug. Mani-

festly the legislature never intended, nor contemplated, when this law was passed — and the language will not bear such construction — that all the employes of the engineering department of the city, including the chief engineer, should have additional compensation for services which they might render to the rapid transit commission in addition to the duties they are called upon to perform under their appointment or employment. If the contention of the city solicitor were sustained by this court, it would in effect mean that the rapid transit commission might also give additional compensation to the city solicitor for services which he renders in advising the board and acting as its counsel. The board of rapid transit commissioners itself, when it appointed Mr. Krug, the first time, in November, 1915, as its engineer, placed no such construction upon this third section of the law as is now claimed for it. It appointed or designated him as its engineer without compensation, and it was only in July, 1916, more than six months after he had been acting as the engineer of this board, that it undertook to fix additional compensation for him.

It is further urged on behalf of the plaintiff in error that even if compensation can be given to the employes of the rapid transit commission, provision therefor would have to be made by the council of the city of Cincinnati, inasmuch as under Section 4214, General Code, it is provided that council shall by ordinance or resolution “determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective

salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

As to this contention the court is of the opinion that the act providing for the rapid transit commission (106 O. L., 286) gives the commission the authority to employ the necessary clerks, engineers, employes, etc.; that it is an exception to Section 4214, General Code, this act having been passed subsequently to the enactment of Section 4214 and being in apparent conflict therewith. We would hesitate to construe this law so as to hold that the council of the city of Cincinnati could hamper the action of the commission by neglecting or refusing to provide for the compensation of the clerks, employes, etc., who might be employed by this commission, or by providing them with insufficient compensation. We think that the fair construction of the act requires us to hold that the board of rapid transit commissioners has the power and authority to employ the necessary clerks, engineers and employes, and as an incident to their employment to fix their compensation, without being required to call upon the council of the city of Cincinnati to fix such compensation. In this particular instance it seems to us that Mr. Krug cannot be an independent employe of the rapid transit commission, as is claimed by the city solicitor, and at the same time act as the engineer in the subdepartment of public service of the city of Cincinnati. The very objection urged by the city

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solicitor could be made, if Mr. Krug occupied the dual position of being under the direction and control of the director of public service in the engineering department of the city of Cincinnati, at a salary of \$6,000 a year, and at the same time under the independent control of the rapid transit commission at a salary of \$9,000. He would be, in effect, serving two masters, and perhaps under conflicting orders given by the director of public service and the board of rapid transit commissioners.

We hold that the only rational construction to be placed upon the language of Section 3 of the act under construction is that the board of rapid transit commissioners at its option may employ an engineer who is not holding a position in the public service of the city of Cincinnati and fix his compensation, or may designate the engineer of the city of Cincinnati as its engineer, but in so doing cannot allow him any additional compensation.

We do not deem it necessary to cite numerous authorities in support of the conclusions we have reached, but content ourselves with holding that the demurrer filed by the plaintiff in error to the answer of the defendants should have been sustained and not overruled; and for this reason the judgment of the court below is reversed, and the cause remanded for further proceedings.

Judgment reversed, and cause remanded.

JONES, E. H., P. J., and JONES, OLIVER B., J.,
concur.

SHERRY v. THE LOCOMOTIVE ENGINEERS' MUTUAL
LIFE & ACCIDENT ASSOCIATION ET AL.

Life insurance—Designation of beneficiary—Proceeds payable to wife—Death of first wife, leaving children—Second wife entitled to proceeds, when—Mutual benefit societies.

Where insurance is taken in a benevolent organization, payable to the wife of the insured or his lawful heirs, and subsequent to the death of the said wife and the remarriage of the insured the said policy was taken up and two new policies issued in its stead, without change with reference to the beneficiary, the proceeds of said policies become, at the death of the insured, the property of the second wife, and no part thereof is payable to the children of the first wife.

(Decided November 18, 1916.)

ERROR: Court of Appeals for Muskingum county.

Mr. E. F. O'Neal, for plaintiff in error.

Mr. H. C. Pugh, for defendants in error.

HOUCK, J. This is a proceeding in error to reverse the judgment of the common pleas court of Muskingum county, Ohio. The parties hereto occupy the same position to each other as in the court below. The plaintiff, Mary A. Sherry, brought suit in the court below to recover on two insurance policies on the life of her husband, Patrick Sherry. The admitted facts in this case are as follows:

That on or about the first day of March, 1869, Patrick Sherry became a member of the defendant association; that at said time and by right of said membership there was issued to him a policy of life insurance in said defendant association in the

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sum of \$3,000; that afterwards, on the 20th day of July, 1894, the said association took up the said certificate of membership and the said policy of life insurance theretofore issued to the said Patrick Sherry, and in its stead issued to the said Patrick Sherry two certificates of membership, or policies of insurance in its said association, each for the sum of \$1,500; that Patrick Sherry died on or about the 24th day of October, 1914, and at the time of his death all of the assessments due from him to said association by reason of said certificates of insurance and policies had been fully paid; and, further, that at the time of the death of the said Patrick Sherry he was in good standing in said association and said policies of insurance were in full force.

It is further agreed that at the time Patrick Sherry took out his policy in said association (in 1869) Mary McNally Sherry was the wife of the said Patrick Sherry, and continued to be his wife until the date of her death on February 21, 1886, and that, thereafter, and before the 20th day of July, 1893, being the date that said original policy of insurance was taken up and the two new policies issued in place thereof, as above stated, Patrick Sherry married the plaintiff, Mary A. Sherry, who continued to be his wife until the date of his death.

It is also further agreed that six children were born of the marriage between Patrick Sherry and his first wife, Mary McNally Sherry, and that no children were born of the second marriage.

The defendant association filed an answer in the nature of an interpleader, in which it averred that it is ready to pay said sum to the lawful dis-

tributee or distributees under said policies, and will do so upon the order of the court.

With reference to the beneficiaries thereunder each policy contains the following provision:

"All payments or benefits that may accrue or become due to the heirs of the person insured, by virtue of this policy, will be payable to Mrs. Patrick Sherry, wife, or his lawful heirs."

It will at once be observed that this clause is the governing factor to determine to whom the insurance money in question is to be paid, and this is to be determined from the plain meaning of the language used in said clause. It is urged by counsel for plaintiff that by reason of the death of Mary McNally Sherry, the first wife of Patrick Sherry, and the subsequent marriage of Patrick Sherry and Mary A. Sherry, the plaintiff herein; by reason of the issuing of the policies in question to Patrick Sherry subsequent to the marriage between Patrick and the plaintiff; and by reason of the fact that the plaintiff was his wife at the time of his death, plaintiff is entitled to all of the benefits arising under said policy of insurance; that she is the sole and only beneficiary; and that she is the Mrs. Patrick Sherry, wife of the said Patrick Sherry, deceased, and as such is entitled to said insurance money in question.

It is contended by counsel for the six children that the said Mary A. Sherry is entitled only to her legal share therein as surviving widow of the said Patrick Sherry, deceased, and that the children are entitled to the residue.

In determining the rights of these parties under these policies we must rely wholly and entirely

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upon the language used in the clause hereinbefore referred to. At the time of the death of Patrick Sherry he had but one wife living, to-wit, the plaintiff in this case. At the time of the execution and delivery of the policies in question he had but one wife living, the plaintiff herein. If he had intended to make any other person than his then wife, Mary A. Sherry, the sole beneficiary of said insurance policies, he certainly would have done so. It seems to us, being governed in the distribution of the fund in question by the surroundings of the parties, taken in connection with the plain meaning of the beneficiary clause in the policies, that in the light of all these facts there can be but one conclusion reached, and that is that Mary A. Sherry is entitled to all of the fund and is the sole beneficiary of the two policies in question.

It is contended by counsel for defendants that at the time the policy was taken out, in 1869, being the original policy, Patrick Sherry by his choice made provision for and designated the beneficiary thereunder, and must naturally, if not necessarily, have had in mind the person who was then his wife. If this line of reasoning be the correct one, then why is it not proper to claim that at the time when the two policies here in question were issued, and the plaintiff in this case was his wife, Patrick Sherry made his choice and designated the beneficiary, and of necessity had in mind the person who was then his wife? It seems to us if we apply to the two policies in question this same reasoning that is applied by counsel for defendants to the original policy we can arrive at but one conclusion,

and that is that the plaintiff is entitled to the proceeds of the policies in question.

Judgment reversed, and judgment for plaintiff in error, the costs to be paid out of the fund and the residue to be paid to the plaintiff in error. Cause remanded to the common pleas court for execution.

Judgment reversed, and cause remanded.

SHIELDS and POWELL, JJ., concur.

THE P. & C. SCHNEIDER CO. v. WAGNER.

Accident—Negligence—Ordinary care—Dangerous machine—Contributory negligence.

A company operating a grocery used therein a large coffee-mill which was operated by hand. Upon the side of this coffee-mill was a large flywheel to the rim of which was attached a handle. Between the end of this handle and the wall or shelving there was a space of 17½ inches. Some employe who had used this mill had left the wheel in motion, and a clerk while in the performance of her duties and while passing through the space above described was struck by the revolving handle and severely injured. *Held:* That the company was not guilty of negligence and therefore not liable to respond in damages to the clerk. In law's domain the occurrence must be regarded as an accident for which no one is answerable and for which no remedy is provided.

(Decided May 22, 1916.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Cohen, Mack & Hurtig, for plaintiff in error.

Mr. Samuel L. Hagans and Messrs. Black, Swing & Black, for defendant in error.

JONES, E. H., P. J. The plaintiff below, Lulu Wagner, was employed by the defendant company as a clerk in its grocery. There was in this store a large coffee-mill operated by hand. Upon the side of this coffee-mill was a large flywheel to the rim of which was attached a handle. Between the end of this handle and the wall or shelving there was a space of $17\frac{1}{2}$ inches. Some employe who had used this mill had left the wheel in motion, and Miss Wagner, while in the performance of her duties and while passing through the space above described, was struck by the revolving handle and severely injured. She recovered a judgment below for \$2500. This proceeding is brought to reverse that judgment.

The petition charges the company with negligence in four particulars:

1. Failure to guard said mill, alleging that it is a dangerous machine.
2. Placing of the mill in a dangerous position, with a space of not more than two feet between it and the shelves.
3. Allowing trash, boxes and other material to accumulate in the aisle, so that there was not sufficient space to allow one to pass in safety.
4. Another clerk left said mill revolving rapidly.

The answer admits the employment of Miss Wagner, the business in which defendant was engaged, and denies everything else in the petition.

At the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved for an instructed verdict, upon the ground that no act on the part of defendant constituting negligence was shown. The overruling of these motions by the trial judge is principally relied upon for a reversal of the judgment. The question thus raised, being fundamental, is entitled to first consideration, and disposes of the case, in the view we take of it.

The evidence shows that the injury received by Miss Wagner was a serious one. But while most injuries from violence are the result of crime, or of culpable negligence on the part of some one, such is not always the case. Many personal injuries are received for which the law provides no remedy or recompense. Negligence, in its legal sense, is the failure to exercise ordinary care, not the highest degree of care. It was ordinary care that the defendant owed to Miss Wagner. Wherein did he fail to exercise it? What act of negligence by him was the direct and proximate cause of her injury? Should he in the exercise of ordinary care have foreseen the injury as the probable result of the coffee-mill or its revolving wheel? These are questions raised by the record and briefs in this case, and must be answered. We can give but one answer, namely, that there is no evidence to support the judgment below. The result of that judgment is to exact from the one against whom it is rendered a very high and unreasonable degree of care.

There was nothing inherently dangerous about the coffee-mill. It cannot be regarded as a dangerous machine. To leave the wheel in motion, with

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the power removed, in the place and under the conditions described, cannot be actionable negligence. The danger, if any, was as obvious to Miss Wagner as to anyone else. If there was danger, she should have avoided it by going another way, or by keeping away from the handle while passing through the aisle. There was a way by which she could have reached the part of the store to which she was going, without passing the mill.

But in deciding this case against her we do not act upon the theory that she was negligent and for that reason cannot recover. This reversal is upon our conviction that there is in the record no evidence of negligence on the part of the defendant.

The injury might have been avoided by the exercise of great care. Such care is not exacted by the law. In law's domain this occurrence must be regarded as an accident for which no one is answerable and for which no remedy is provided.

The judgment will be reversed, and the judgment which the lower court should have rendered will be entered here.

Judgment reversed, and judgment for plaintiff in error.

JONES, OLIVER B., and GORMAN, JJ., concur.

CHARVILLE v. THE STATE OF OHIO.

Criminal law—Sufficiency of indictment—Sale of obscene photograph—Failure to give copy or excuse omission—Not reversible error, when—Section 13581, General Code.

1. The rules of criminal practice require that an indictment charging the sale of an obscene, lewd and lascivious photograph should set forth a copy thereof, or give such a description as decency permits and aver that the photograph is too obscene for further description or recital.
2. An indictment for this offense, which does not give a copy of the obscene photograph, nor an excuse for its omission, is defective, but such defect is within the curative provisions of Section 13581, General Code, and a judgment of conviction will not be reversed where such defect does not prejudice the substantial rights of the defendant on the merits.

(Decided December 18, 1916.)

ERROR: Court of Appeals for Huron county.

Mr. A. M. Beattie, for plaintiff in error.

Mr. Irving Carpenter, for defendant in error.

RICHARDS, J. At the April term, 1916, Wilbur J. Charville was indicted by the grand jury of Huron county, the indictment containing two counts. The second count of this indictment charged him with unlawfully and knowingly having in his possession on March 15, 1916, for the purpose of selling, and with then selling to one Arthur C. Link, eight obscene, lewd and lascivious photographs. The first count of this indictment was the same as the second except that the charge described the articles as pictures instead of photographs.

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The defendant filed motions to quash the different counts of the indictment, and, on these motions being overruled, he excepted and filed demurrers to the several counts of the indictment, and, on these demurrers being overruled, he was placed on trial and was convicted under the second count of the indictment and sentenced thereunder.

He now prosecutes error to this court, contending the court erred in overruling the motions to quash the indictment, and likewise in overruling the demurrers thereto. No bill of exceptions was taken and the case is submitted to this court solely on the exceptions to the judgments rendered on the motions and demurrers as aforesaid.

It is claimed that the indictment is bad for duplicity, and because it fails to show how the articles mentioned were sold, and because it does not contain a copy of the photographs nor any facts showing that they were either obscene, lewd or lascivious.

We have no hesitancy in reaching a conclusion that the indictment is not objectionable on either of the first two grounds stated. It is not justly subject to the charge of duplicity; nor is it lacking in certainty for failing to state in detail how the photographs were sold.

The criticism on the indictment that it contains neither a copy of the photographs nor any averments showing how the same are obscene, lewd or lascivious, and no excuse for failing to make such an averment, is not so easily disposed of. It is quite true that the rules of pleading in criminal cases of this character justify omitting from indictments obscene allegations, but it appears to be

equally true that the necessity for such omission should be set forth in the indictment in order to make the same technically in compliance with the law. If a copy of the photographs is not given, good pleading would require that such a description as decency permits should be given, and then the indictment should contain an averment that the photographs are too obscene or lewd or lascivious for further description or recital. This rule, in substantially this form, has been the almost uniform practice for many years in this country, and is stated so recently as 1913 in Section 496 of the edition of Bishop's New Criminal Procedure, then published. See, also, 8 Ruling Case Law, 317, Section 344. Occasionally here and there may be found a case which has broken over the rule as stated, but the great current of authority is in accordance with the principle announced.

It was under consideration by the supreme court in *The State of Ohio v. Zurhorst*, 75 Ohio St., 232. The indictment in that case contained an averment that the printed matter was so indecent and immoral that it would be offensive to the court and improper to be placed upon the records thereof, and the indictment was sustained by the supreme court.

The indictment in the case at bar fails to contain any such averment. We must therefore reach the conclusion that it is defective and justly subject to the criticism made against it.

Having reached this conclusion, it does not necessarily follow that the judgment must be reversed and the defendant discharged. The records of the courts contain cases where violators of

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the criminal law have gone unwhipped of justice because of technicalities which in no wise affected the substantial merits of the case or resulted in prejudice to the defendant. To avoid this evil the general assembly of Ohio, as early as 1869, in adopting the code of criminal procedure for the state, enacted in Section 90 thereof, as found in 66 Ohio Laws, 301, a provision intended to obviate the evil mentioned. This section as then enacted is substantially the same as is now known as Section 13581, General Code. It enumerates a large number of defects which shall not be deemed to make an indictment invalid, and contains in addition the general statement that the indictment shall not be held invalid "for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits."

Therefore, even though the indictment is defective for the reason already stated, the question remains whether such defect is one which tends to prejudice the substantial rights of the defendant. No question is or could be made but that the indictment would be valid if it contained an averment that the obscene, lewd and lascivious photographs were too obscene to set out or to further describe. Is the omission of that averment in the indictment so prejudicial to the substantial rights of the defendant as to require a judgment of reversal? We are unanimously of the opinion that it is not. If the averment were in the indictment, it necessarily would not advise the defendant of anything which he did not already know. The indictment mentions eight particular photographs which were obscene, lewd and lascivious, and which

were on a specific day named, sold by the defendant to Arthur C. Link. In view of the substantial sentence in this case of a fine of \$1000 and imprisonment for not exceeding five years, it is evident that the trial court believed the photographs were of such a character as would have merited the averment.

The section of the General Code under consideration has been many times cited and construed. It will only be necessary to refer to one or two of the cases. In *Lynch v. State of Ohio*, 5 Ohio App., 16, the nature and character of the instrument with which the homicide was committed were not particularly described, and it was held that this defect did not prejudice the substantial rights of the accused and did not invalidate the indictment.

In *Tingue v. The State*, 90 Ohio St., 368, the section was quoted in full in the opinion of the court, the supreme court announcing in the syllabus that a mistrial should not be ordered simply because some error had intervened, but that the error, to justify such holding, must prejudicially affect the merits of the case and the substantial rights of the defendant.

Whether the substantial-prejudice statute could be applied to a case where the indictment charges the use of obscene and licentious language, and an infirmity exists therein similar to that in the case at bar, need not be determined. An indictment charging such offense without setting out the language, and without giving an excuse for the omission, was held bad by the common pleas court in *Hummel v. The State*, 10 O. D., 492, apparently without giving consideration to the section of the General Code

to which reference has been made. The certainty and precision manifest in photographs, and the uncertainty of the human memory in recalling oral statements, are facts patent to all.

In view of the fact that no bill of exceptions was taken, an interesting question has arisen which we deem it unnecessary to decide, namely, whether the court might not be justified in assuming, in favor of the regularity of the judgment, that on the trial of the case the defendant himself may have made such admissions or statements, or offered such evidence, or permitted the state to prove, without objection, such matters as would have cured the defects in the indictment.

We hold that while good pleading would have required that the indictment contain a copy of the photographs, or such description of the same as decency would permit, or an averment that the same were too obscene for recital, yet such failure was not in this case prejudicial to the substantial rights of the defendant.

The judgment will, therefore, be affirmed.

Judgment affirmed.

CHITTENDEN and KINKADE, JJ., concur.

SMITH v. FEASLEY.

Replevin—Sufficiency of affidavit—Verified by attorney for plaintiff.

An affidavit in replevin is not a pleading, and its verification is not governed by Section 11358, General Code, limiting the causes in which the verification may be by an agent or attorney, but rather by Section 12052, making an affidavit of an agent or attorney of the plaintiff sufficient.

(Decided November 18, 1916.)

ERROR: Court of Appeals for Muskingum county.

Mr. H. C. Wine, for plaintiff in error.

Mr. A. A. George, for defendant in error.

HOUCK, J. Plaintiff in error, who was plaintiff below, contends that the common pleas court erred in sustaining a motion to his affidavit in replevin, and also in dismissing the petition in the case. The affidavit in replevin was made by the attorney for the plaintiff in error, and the defendant in error urges that it is not sufficient in law, because it does not comply with the provisions of Section 11358, General Code. Upon the other hand, the plaintiff in error contends that the verification of said affidavit in question was made under favor of Section 12052, General Code, and that the same is in full compliance with law.

Upon an examination of these sections of the General Code, we are fully convinced that the claim of plaintiff in error is sound. An affidavit in re-

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plevin is not a pleading, and therefore Section 11358, General Code, does not apply as to the verification, or as to the party authorized in a replevin case to make the affidavit. Section 12052 governs. The affidavit under consideration, as we view it, fully complies with all the provisions of Section 12052, General Code. Therefore, from our examination of the record in this case, we find error therein prejudicial to the rights of the plaintiff in error, and the judgment of the common pleas court is reversed and the cause is remanded to that court with instructions to overrule the motion to the affidavit in replevin; and the order dismissing the petition is set aside.

Cause remanded to the common pleas court with instructions to carry out the order of this court.

Judgment reversed and cause remanded.

SHIELDS and POWELL, JJ., concur.

THE KANAWHA & MICHIGAN RAILWAY CO. v. THE
COURT OF COMMON PLEAS ET AL.

Writ of prohibition—Not writ of error—Jurisdiction determined by pleadings—Absolute want of jurisdiction essential in order to invoke writ of prohibition.

1. The writ of prohibition can not be made a substitute for a proceeding in error, and in order to invoke this writ there must be an absolute want of jurisdiction.
2. Jurisdiction is determined by the pleadings, and when the petition contains an averment sufficient to invoke the jurisdiction of the court, the question of jurisdiction must be met by tendering an issue of fact which the court has jurisdiction to decide and the decision of which may be reviewed on error. This rule is not changed by an admission of counsel that the averment in question is not supported by the facts. Under such conditions the remedy is error and not prohibition.

(Decided March 7, 1916.)

IN PROHIBITION: Court of Appeals for Franklin county.

Mr. W. N. King and Mr. E. J. Jones, for applicant.

FERNEDING, J. An *ex parte* application is made for a writ of prohibition against further proceedings in the case of Clarence C. Casebolt against the applicant in a proceeding pending in the court of common pleas of Franklin county. This writ can not be made a substitute for a proceeding in error. *State, ex rel. Broenstrup, v. The Court of Common Pleas of Montgomery County* (decided by the supreme court June 3, 1913, 11 O. L. R., 72,) and *State, ex rel. Garrison, v. Brough et al.*, 94 Ohio St., 115.

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In order to invoke the writ, there must be an absolute want of jurisdiction. Jurisdiction is determined by the pleadings. It is admitted in the case at bar that the petition contained an averment that the applicant's railroad extended into Franklin county. This averment was sufficient to invoke the jurisdiction of the court of common pleas of Franklin county. The case is similar to that of a party brought in from another county because of a joint liability with a party over whom the court has jurisdiction. See *Allen v. Miller*, 11 Ohio St., 374.

In such case the question of jurisdiction must be met in that case by tendering an issue of fact which the court has jurisdiction to decide and the decision may be reviewed on error. We think this rule is not changed by the fact that counsel for the plaintiff in the action in the court of common pleas admitted on the hearing of a motion to dismiss for want of jurisdiction that the railway company did not extend into Franklin county. This admission formed no part of the pleadings and would be merely evidence upon which the court of common pleas might be justified in acting in determining the issue of fact as to jurisdiction.

We have therefore reached the conclusion that the applicant's remedy is error and not prohibition.

Application refused.

KUNKLE and ALLREAD, JJ., concur.

KECK, EXR., v. BAHLKE.

Contracts—Evidence—Suits against executors—Municipal court of Cincinnati—Jurisdiction.

1. Conversations between witnesses and a decedent are not admissible in evidence on behalf of decedent's executor in a suit against such executor on a contract made by decedent, where such conversations were had in the absence of the other party to such contract.
2. The municipal court of Cincinnati has jurisdiction to try and determine an action against an executor on a claim rejected by him.

(Decided June 12, 1916.)

ERROR: Court of Appeals for Hamilton county.

Mr. L. D. Oliver and *Mr. W. M. Beinhart*, for plaintiff in error.

Mr. M. Muller, for defendant in error.

JONES E. H., P. J. The plaintiff in error seeks a reversal of the judgment of the common pleas court affirming the municipal court of Cincinnati. In the municipal court Harry Bahlke recovered a judgment against P. A. Keck, as executor of the estate of Maria Hellman, for board and lodging furnished decedent, who was the mother of Mrs. Bahlke. The amended petition alleges an express contract providing for compensation at the rate of \$2 per week.

There was evidence of two competent witnesses to the effect that when the old lady came to live with Mr. and Mrs. Bahlke she agreed to pay Bahlke \$2 per week. This evidence was uncontroverted. Some evidence was received as to another contract providing for the payment of \$5 per

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month for lodging. This evidence related to conversations between witnesses and decedent, in the absence of Bahlke, and was clearly inadmissible, as was much of the evidence offered and received on behalf of defendant. But considering all the evidence in the record we cannot say that the judgment is not supported by sufficient evidence.

The remaining question is one of jurisdiction. Plaintiff in error attacks the jurisdiction of the municipal court in this kind of an action. The question was not raised until this court was reached, and it is claimed the objection was thus waived and that complainant is now estopped. We are inclined to the opinion that this point is not well taken, but do not deem it necessary to decide the question.

The municipal court by the statute creating it has jurisdiction to try and determine this kind of an action. The plaintiff in his petition below asked not only that his claim be allowed, but also for judgment against the defendant executor. The law provides (103 O. L., 279, 280):

"SECTION 6. The municipal court shall have the same jurisdiction in criminal matters and prosecutions for misdemeanors or violations of ordinances as heretofore had by the police court of Cincinnati and in addition thereto shall have ordinary civil jurisdiction within the limits of said city of Cincinnati in the following cases: * * *

"2. In all actions and proceedings for the recovery of money or personal property of which the court of common pleas has, or may be given, jurisdiction, when the amount claimed by any party, or the alleged value of the personal property sought to be recovered, does not exceed \$600.00. * * *

"3. All actions on contracts express or implied, when the amount claimed by the plaintiff, exclusive of all costs, does not exceed \$600.00."

These provisions are not affected by amendment.

It was held in *Kennedy v. Thompson, Assignee*, 3 C. C., 446, that a suit for the allowance of a claim against an assignee, where no money judgment was asked, was a civil action of which the court of common pleas had original jurisdiction.

The case at bar was brought under authority of Section 10722, General Code, which provides as follows:

"If a claim against the estate of a deceased person be exhibited to the executor or administrator, before the estate is represented insolvent, and be disputed or rejected by him, and has not been referred within six months after such dispute or rejection, if the debt, or any part of it be then due, or within six months after some part becomes due, the claimant must commence a suit for the recovery thereof, or be forever barred from maintaining an action thereon. No action shall be maintained thereon after such period, by a person deriving title thereto from such claimant."

Section 10725, General Code, recognizes this kind of an action as one for money; in other words, a civil action.

It seems clear, therefore, that the municipal court had jurisdiction to try and determine this case, and there being no error, the judgment is affirmed.

Judgment affirmed.

JONES, OLIVER B., and GORMAN, JJ., concur.

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In re Pontius.

IN RE APPLICATION OF LEONARD PONTIUS FOR A
WRIT OF HABEAS CORPUS.*Jurisdiction—Suspended sentence—Revocation and termination—
After expiration of maximum term—Habeas corpus.*

A judge has no authority to set aside a sentence which he has theretofore suspended, if the period covered by the sentence as originally pronounced has expired.

(Decided November 29, 1916.)

ERROR: Court of Appeals for Stark county.

Messrs. Amerman & Mills, for Pontius.

*Mr. Clarence A. Fisher; Mr. Herbert Hunker
and Mr. Walter S. Ruff, contra.*

HOUCK, J. Leonard Pontius, the plaintiff in error, having been committed to the Canton workhouse by the police court of said city, filed a petition in the court of common pleas of Stark county, Ohio, for a writ of *habeas corpus*; this having been denied, error is prosecuted thereto. The agreed facts are as follows:

Leonard Pontius was convicted of a violation of an ordinance of the city of Canton, Ohio, providing for the punishment of persons found guilty of disorderly conduct. Said conviction was had before the police court of said city on the 27th day of May, 1916, and on that day Pontius was sentenced to the Canton workhouse for a period of 30 days, the same being suspended conditionally upon his good behavior. The longest period for which the ac-

cused could have been sentenced by said police court, under said ordinance, was 30 days.

The judge of said police court, on the third day of August, 1916, set aside the order suspending said sentence, and ordered and directed that the same be enforced, and pursuant thereto the petitioner was committed to the workhouse.

At the hearing on *habeas corpus* it was the claim of counsel for Pontius that the police court was without jurisdiction to put into execution a suspended sentence, after a period of time had expired longer than the length of time for which the petitioner could have been sentenced for the offense charged.

The power of courts and judges in *habeas corpus* is the speedy release, by judicial decree, of persons who are illegally and unlawfully restrained of their liberty. While a writ of *habeas corpus* is in the nature of a writ of error, to the extent that it brings before the reviewing court the legality as to the right and the authority by which the accused is confined, it is also well settled that the writ will not be allowed to take the place of proceedings in error.

The power of courts and judges in *habeas corpus* is clearly defined by statute. The power to discharge is limited to cases where the imprisonment is found to be without authority of law. This can not be extended or enlarged simply to meet a seeming case where an injustice may or may not have been done. The real test must be, Is the petitioner lawfully restrained of his liberty?

Section 12177, General Code, provides that when the judge is satisfied that the petitioner is unlaw-

fully imprisoned or detained, he shall forthwith discharge him from confinement.

Section 12165, General Code, provides:

"If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed."

If the police court had authority to issue the process and order the petitioner committed to the workhouse 68 days after the maximum sentence of 30 days had been imposed and suspended, then the judgment of the common pleas court must be affirmed; otherwise it should be reversed. The question is, Did the police court have jurisdiction over the person of the petitioner and of the subject-matter of the controversy at the time it set aside the order suspending the sentence and issued the order and process committing Pontius to the workhouse? If the court was without jurisdiction to do this, then the petitioner is unlawfully deprived of his liberty, and should be discharged.

This question must be determined by the proper construction to be placed upon Section 13714, General Code, which is as follows:

"Upon such revocation and termination, the court or magistrate may pronounce judgment at any time after the suspension within the longest period for which the defendant might have been sentenced, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence."

We think this section of the statute is clear, plain and unambiguous; and by its provisions the police court was given authority to revoke or set aside the order of suspension and enforce the execution of the sentence in question at any time within the 30 days after its suspension, which 30-day period was the longest time for which the police court, under the ordinance, could sentence the petitioner. After this 30-day period the court was without jurisdiction in the premises.

The police judge was humane, and wanted, if possible, to bring about a reformation of the accused, and therefore acted well his part and suspended the sentence for 30 days — the longest period given by law. We commend the court for it, and it is to be regretted that the accused did not profit thereby. When the court suspended the sentence for 30 days the accused was placed upon his good behavior, but the court took the chance of his reforming within the 30-day period. If at the end of that period he had not done so, the court thereafter was without jurisdiction in the premises.

The court had authority and jurisdiction in this case to enforce the execution of the sentence any time within the said 30 days, but not thereafter. During this 30-day period the petitioner was, in law, imprisoned. Imprisonment is not confined to the act of putting a man in prison; it may take place without actual application of any physical agencies of restraint, such as locks or bars; it may be and can be by verbal compulsion. Any restraint of one's personal liberty is sufficient to constitute imprisonment, and any restraint of a person by another, against his will, is imprisonment as con-

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templated by law; and if it be without right is unlawful.

We hold that an order setting aside the suspension of the sentence in the case at bar might legally have been made at any time within the 30-day period, and process might have been issued by the police court committing the petitioner to the workhouse; but after the 30-day period the police court was without jurisdiction to act in the premises.

Upon a careful examination of the record before us we have reached the conclusion that there is error in the record to the prejudice of the plaintiff in error, for the reasons hereinbefore set forth, and therefore the judgment of the common pleas court is reversed and judgment entered for the plaintiff in error. And there being no disputed questions of fact in this case, and the court coming now to render the judgment that the court below should have rendered, it is ordered and adjudged by the court that a writ of *habeas corpus* be allowed. as prayed for by the petitioner below, the plaintiff in error here, and that said petitioner be discharged from his imprisonment, and be released from the custody of the superintendent of the Canton, Ohio, workhouse, at the costs of the respondent, and this cause is remanded to the common pleas court with instructions to carry into execution the judgment of this court.

Judgment reversed and petitioner discharged.

SHIELDS and POWELL, JJ., concur.

LEEN, ADMR., v. LEEN.

Action against administrator—Claim for services rendered deceased—Effect of plaintiff's disqualification as a witness—Plaintiff not regarded as relative or member of household, when.

1. In an action against the administrator of a deceased person for services rendered the deceased during his lifetime, the plaintiff being by statute disqualified as a witness, there can be no inference that nothing was said between plaintiff and deceased about the inadequacy of the compensation being paid.
2. A person not related to another by blood, and not in any sense a member of his family or household, is not barred from recovering for services rendered, merely because no express contract is shown.

(Decided June 12, 1916.)

ERROR: Court of Appeals for Hamilton county.

Mr. Anthony B. Dunlap, for plaintiff in error.

Mr. David Davis and Messrs. Conway, Mueller & Conway, for defendant in error.

JONES, E. H., P. J. The defendant in error, Jane Leen, brought her action in the common pleas court against Patrick Leen, as administrator of the estate of Maurice H. Leen, deceased, seeking to recover compensation at the rate of \$24 per week for services rendered to the decedent Maurice H. Leen. In her itemized statement she charged \$20 per week for nursing and care, and \$4 per week for looking after the business interests of the decedent, viz., in paying taxes, insuring the property, looking after repairs, paying bills, banking money, etc.

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An answer was filed in the court below denying the allegations of the petition, and thereupon the cause came on for trial before the court and jury, which resulted in a verdict and judgment for the plaintiff below in the sum of \$1613.02.

We are asked to reverse this judgment on the grounds, first, that it is not supported by sufficient evidence and, second, because the court erred in its charge to the jury.

After carefully considering these assignments of error the majority of the court are of the opinion that neither of them is sustained by the record. It appears that the charge of the court was a full and fair exposition of the law as touching the issues made by the pleadings.

The complaint of the plaintiff in error that the verdict of the jury is not sustained by sufficient evidence is based upon the claim that the evidence shows that Mrs. Leen for several years prior to the death of the intestate, and up to a time within a year or so of his death, had been rendering him services in cooking, cleaning, and to a limited extent in nursing him, at the rate of \$3 per week. The homes of the parties involved were near each other, being separated only by one narrow lot. During the period of time just referred to Mrs. Leen for the most part remained at home and looked after her own household. She discontinued this work for a period of several weeks, whereupon Mr. Leen came over to her house and told her that he could not get along without her assistance, and asked her if she would not again help him. To this she assented, but, from this time on, the evidence shows her work was much more arduous and exact-

ing, requiring a great deal more of her time. Mr. Leen became very much afflicted, and suffered the amputation of one of his legs, by reason of which she was compelled to remain with him in his house almost continuously, day and night. There is also evidence tending to show that she performed the services in connection with his business affairs upon which she in her petition places the value of \$4 per week. She received during this time the sum of \$3 per week. There is no evidence, however, to show that this was paid to her in full for her services. The malady from which Mr. Leen was suffering was progressive; his condition was constantly becoming worse; and it is only fair to presume, in explanation of the lack of definite understanding as to compensation, that the work was becoming more and more irksome, and thus more valuable, and also that Mr. Leen was in no condition physically to talk with her over business matters, especially matters pertaining to his own personal care and comfort.

The action being one against the administrator of a deceased person, the plaintiff, Mrs. Leen, was by statute disqualified as a witness, so there can be no inference that nothing was said between her and her patient, Mr. Leen, during his long illness, about the inadequacy of the compensation he was paying her. She may have protested and remonstrated with him every time he handed her her pittance of \$3 a week, and, unless same occurred in the presence of a third party competent to testify, she is helpless to prove such conversations. It may even be that it was distinctly agreed between the parties that the sum paid to her was only on account, and

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represented only a part of what she was actually to receive. It seems, therefore, that any conclusion reached in this case based upon the theory that she never objected to the \$3 per week or complained as to the inadequacy thereof, or any conclusion that the mere fact that weekly payments were made shows that such payments were in full, or any conclusion that by receiving these weekly payments regularly she is now estopped, can only be based upon her compulsory silence and is unsupported by any word or circumstance appearing in the record.

In view of the dissenting opinion which follows, we must add that in our opinion the rule laid down in the case of *Hinkle et al., Exrs., v. Sage*, 67 Ohio St., 256, relating to claims for services to a deceased person by a relative or member of his household, cannot apply here. Prior to her employment with Mr. Leen the plaintiff had never lived in the house with him, nor did she so live after her employment. There was no blood relationship between the parties, and the only relationship that existed at this time was that Mrs. Leen was the widow of a deceased nephew of Maurice H. Leen. Neither the case above referred to nor any of the other numerous cases in which the same principle is discussed has aught to do with any condition or family relationship such as has been shown to have existed between these parties. We know of no case in Ohio, or for that matter in any other state, where it has been held that a person not related to a person by blood, and not in any sense a member of his family or household, is barred from recovering for services rendered unless an express contract is shown. That the rule laid down in *Hinkle*

v. *Sage* and later cases is a wholesome one will not be denied. Neither can it be denied that this rule has no application whatever to the facts in this case.

In view of the evidence in the record as to the labors and responsibilities which rested upon Mrs. Leen, there certainly can be no presumption that the \$3 were paid to her in full for all her services, and there was a lack of direct evidence to show that such was the case.

The jury was therefore justified under the evidence in awarding her compensation in addition to the \$3 per week, and the amount of same was a matter entirely within the province of the jury and for its determination, in the absence of any indication of passion or prejudice, — they having been made fully acquainted with the nature of the services which she rendered.

The judgment will therefore be affirmed.

Judgment affirmed.

JONES, OLIVER B., J., concurs.

ORMAN, J., dissenting. The evidence in this case discloses that during the entire time that the plaintiff rendered the services to the defendant's intestate she was paid each week the sum of \$3 and received the same as her compensation for the services rendered. She made no complaint or objection to the amount paid her. She never notified or apprised the decedent that she was dissatisfied or expected to be paid more for her services. For a long time prior to her last employment she was also

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paid the sum of \$3 per week. Under these circumstances it appears to me that she is now estopped from claiming that her services are worth more than \$3 per week. "He who will not speak when he should, should not be heard to speak when he would." The decedent's mouth is closed in death, and it appears to me that the acceptance of the amount paid Mrs. Leen each week estops her, after the death of Mr. Leen, from claiming that she was entitled to more.

The cupidity and avarice of relatives of deceased persons so frequently tempt them to make claims against the estates of deceased persons, especially when they are dissatisfied with some provision made for them by the deceased, that the courts should frown upon all efforts to raid the estates of deceased persons.

I am fully convinced that prior to the death of Mr. Leen the plaintiff in this case had no intention to make a charge of more than \$3 per week for her services, and that this claim upon her part was an afterthought. I am of the opinion that the verdict was manifestly against the weight of the evidence, and that the defendant proved conclusively that the services rendered by the plaintiff to the decedent were fully paid for during the lifetime of the decedent.

For these reasons I am constrained to say that the judgment should be reversed.

GRAFF v. GRAFF.

Court of appeals—Jurisdiction—Alimony judgment by circuit court—Installments payable during wife's life—Or until further order—Petition to modify.

1. The court of appeals has jurisdiction to entertain a petition filed in such court to modify or vacate a judgment for alimony rendered by the circuit court, and made payable in monthly installments during the life of the wife or until the further order of the court.
2. When a judgment for alimony is made payable in certain monthly installments until the further order of the court, the latter clause may be regarded as an implied reservation of jurisdiction in such court, or its successor, to modify such judgment at a subsequent term upon petition of the party against whom the order was made.

(Decided March 14, 1917.)

ON MOTION: Court of Appeals for Licking county.

Mr. A. A. Stasel and Messrs. Flory & Flory, for plaintiff, Elizabeth Mary Graff, Exrx.

Messrs. Kibler & Kibler; Messrs. Fitzgibbon & Montgomery, and Mr. Phil B. Smythe, for defendant, Louisa Graff.

ALLREAD, J., of the Second District, sitting in place of SHIELDS, J. Elizabeth Mary Graff, executrix of the last will and testament of George Graff, deceased, seeks by a petition filed in this court to vacate or modify a judgment rendered by the circuit court, on appeal, at the March term, 1900, ordering the plaintiff, George Graff, now deceased, to pay as alimony for the support of Louisa Graff

the sum of \$25 per month during her natural life, or until the further order of said court.

The case is submitted at this time upon motions of the respective parties for judgment on the pleadings.

The defendant first objects to the jurisdiction of the court of appeals. It is contended that final judgment having been rendered in the circuit court, and there having been no pending action or proceeding in the circuit court when the constitutional amendment providing for the court of appeals became effective, this court is without jurisdiction to disturb the original judgment.

The judicial amendment creating the court of appeals provides:

"The courts of appeals shall continue the work of the respective circuit courts and all pending cases and proceedings in the circuit courts shall proceed to judgment and be determined by the respective courts of appeals, * * * and the circuit courts shall be merged into, and their work continued by, the courts of appeals."

The first clause treats in the conjunctive of the work of the circuit court and the disposition of pending cases and proceedings. The new court was, by this provision, to continue the work of the circuit court as well as to dispose of pending cases.

The draftsman of this section, with a view evidently of securing a broad interpretation, added the second paragraph above quoted. By such paragraph the circuit courts were not in a legal sense abolished; but were merged into the courts of appeals. The court of appeals, therefore, represents the circuit court not only as to active cases pending

on January 1, 1913, but as to all jurisdiction which the circuit court had over judgments theretofore entered.

This we think is the reasonable and natural interpretation of the terms employed in the constitutional amendment, and is in line with the decision in the case of *State, ex rel. Chittenden, v. Harmon, Governor*, 87 Ohio St., 364. The fact that alimony cases are not appealable does not affect the jurisdiction of the court of appeals over a case properly appealed to the circuit court and coming up for consideration by the court of appeals as successor of the circuit court.

It is next contended that the judgment of the circuit court in 1900 was not one for alimony, but was for a division of the property under Section 11993, General Code, and, therefore, not subject to the continuing jurisdiction of the court in which the judgment was rendered. Counsel for defendant in this connection cite the case of *Hassaurek v. Markbreit, Admr.*, 68 Ohio St., 554. Counsel for plaintiff cite the case of *Ulney v. Watts*, 43 Ohio St., 499.

These cases may be reconciled when the judgment under review in each case is considered. The *Hassaurek* case was upon a judgment under Section 11993, General Code. The actual judgment was before the court. The case of *Ulney v. Watts* was disposed of on demurrer to the petition, wherein it was alleged that the judgment was one for alimony, and there was nothing in the petition to indicate that it was not a judgment for alimony. The condition of the present case, when we consider the averments of the petition, is parallel to

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the case of *Ulney v. Watts*. It does not appear in the petition here that the divorce was granted to the plaintiff upon the aggression of the wife, and consequently the court will be required to assume, at this stage, that the judgment is what the plaintiff claims, to-wit, a judgment for alimony and subject to the continuing jurisdiction of the court. Furthermore, the original judgment directing the payment of \$25 per month to the defendant during her life, or until the further order of the court, amounts by implication to a reservation of the jurisdiction of the court over the original judgment. Independent, therefore, of the question whether the judgment of 1900 was technically a judgment for alimony, the court has continuing jurisdiction under the reservation in the entry.

It is next contended by the executrix of the plaintiff that plaintiff's death, *ipso facto*, terminated the liability of his estate. We can not, however, agree with that contention.

The former judgment expressly provides that the payments shall continue during the life of the defendant, or until the further order of the court. Until, therefore, the executrix obtains an order from the court modifying the former judgment, the liability of the estate to pay the amount provided for remains during the life of the defendant.

Both motions will be overruled and the cause held for trial upon the issues.

Motions overruled.

HOUCK, J., concurs.

SIMMS, ADMX., v. THE STARK ELECTRIC RAIL-
WAY CO.

*Trial practice—Authority to require special findings by jury—
Judgment on special findings—Negligence—Ejecting intox-
icated passenger.*

1. It is within the discretionary right of the trial court, even against the objection and exception of both parties, to require the jurors, if they render a general verdict, specifically to find upon particular written questions of fact and return written findings thereon.
2. If the special findings of facts returned by the jury in obedience to the direction of the court, are inconsistent with the general verdict, the former shall control, and it is not error for the trial court to enter judgment thereon.
3. A railroad company operating its cars by electricity in the open country is not negligent in requiring an intoxicated man to leave its car in the night time, for the nonpayment of his fare, at a regular stop for the discharging and receiving of passengers on a public highway, when he, although noticeably intoxicated, was able to walk and talk intelligently.

(Decided October 20, 1916.)

ERROR: Court of Appeals for Mahoning county.

Mr. H. H. Emmerman, for plaintiff in error.

Messrs. Hart & Koehler, for defendant in error.

POLLOCK, J. The plaintiff in error, Eliza Simms, began an action in the court of common pleas of this county against the defendant in error, alleging in her petition that the defendant was operating an electric railroad from the city of Alliance to the village of Sebring; that the plaintiff's intestate, at the time alleged, purchased a ticket and became a passenger on one of defendant's

cars, intending to ride from the city of Alliance to Sebring; and that he was unlawfully ejected from the car by the conductor at a stop on defendant's road, known as No. 47. She further alleges that at the time Arthur Simms was ejected from defendant's car he was intoxicated, and by reason thereof was stupid and bereft of intelligence and unable to take care of himself, which was known to the conductor of defendant's car at the time he was ejected; that it was in the night time, and that there was no direct road from the stop where he was ejected to Simms's home except along the line of defendant's railway, where cars were passing frequently at a high and dangerous rate of speed; and that shortly after Simms was ejected from defendant's car he was struck and killed by another car of the defendant company. She asked damages for negligently causing the death of her intestate.

An answer was filed denying the acts of negligence and alleging that Arthur Simms was guilty of contributory negligence in going upon the private right of way of defendant company.

The evidence adduced at the trial in the court below shows that Arthur Simms took passage on one of defendant's cars at the time alleged, standing on the back platform; that he was intoxicated, and when asked for his fare or ticket he insisted he had a ticket but could not find it. The conductor left him standing on the platform, and when the car stopped to discharge and receive passengers at the station known as No. 47 the conductor again approached him for his fare, and as Simms did not produce his ticket or offer to pay his fare the conductor told him he would have to leave the

car. Thereupon he left the car, which proceeded on its journey, leaving Simms standing at the side of the track.

This stop was on a public highway which crossed the tracks of defendant company at right angles, and was a regular stop on defendant's railroad for discharging and receiving passengers. Shortly afterwards the deceased was found lying on defendant's track a short distance east of the spot where he was ejected. He had been struck by one of defendant's cars and injured so that he died shortly thereafter. From stop No. 47, on the public highway, east to the point where Simms was struck and killed was the private right of way of the defendant company.

On the trial of the case, the court, at the close of the argument, without being requested by either party, submitted five written interrogatories to the jury, with instruction that if they returned a general verdict to return written findings of facts thereto. The jury retired, and afterwards returned a general verdict for the plaintiff, and therewith returned answers to the interrogatories submitted by the court.

Upon motion of the plaintiff, the court refused to enter judgment on the general verdict; but upon motion of defendant gave judgment for defendant on the findings of facts contained in the answers to the interrogatories.

The plaintiff claims that the court erred in entering judgment for the defendant upon the findings of the jury to the interrogatories submitted by the court, and in refusing to give judgment on the general verdict, for the reason that the court is

without authority to require the jury to find specially on particular questions of fact except upon request of a party.

Section 11458, General Code, provides that the verdict of a jury must be either general or special. The next section defines a general verdict, and the following section defines a special verdict. Section 11461 provides that unless otherwise directed by the court the jury may render either a general or a special verdict, and the section following requires the court, on request of either party, to direct the jury to return a special verdict.

We see that under the provisions of Section 11461 the kind of a verdict the jury shall return, whether special or general, does not depend alone upon the request of the parties or the will of the jury, but that the court may direct the jury to render either a special or general verdict. Section 11463 provides that upon request of either party the court shall instruct the jury, if it returns a general verdict, specifically to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon.

This is usually done by submitting to the jury written interrogatories, and directing that if they shall find a general verdict they shall make written findings upon them. The next section provides that if the special finding of facts is inconsistent with the general verdict the former shall control.

The plaintiff in error insists that the court cannot, except upon a request of one of the parties, require the jury to return with the general verdict specific findings upon proper questions of fact in accordance with the provisions of Section 11463,

General Code, and, if the special finding of facts by the jury is inconsistent with the general verdict, enter a judgment upon the special finding of facts, in accordance with the provisions of Section 11464 of the General Code.

It is evident from a reference to Section 11463, General Code, above referred to, that the statute under which the court directs a jury to return with the general verdict a special finding of facts does not specifically provide for the court making such direction upon its own motion, so that if it was not error for the court to do so it must be because of the inherent power of the court to direct and control the procedure in the trial of a case.

We find from an examination of the legal history of the English jury law that the jury had a right to return either a general or a special verdict, and the court had no power over the jury to control the form of verdict. (3 Blackstone's Commentaries, 377.) This right does not seem to have been accorded to the jury by the courts of this country, or at least the jury has not exercised this privilege. The right of the court to inquire of the jury in regard to its acts while in the jury room considering the case, after its submission to the jury, was recognized by the supreme court of Massachusetts in *Hix v. Drury*, 5 Pick., 296.

The practice became common for the trial court to interrogate the jury at the time they returned their general verdict in regard to the grounds on which it was founded, or the court could require them to return with their general verdict a finding as to certain facts, the existence of which were material in determining the rights between the

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parties. This was done upon direction of the court under its discretionary power, for the purpose of enabling the court to determine the materiality of the question upon which the jury based their verdict. *Lawler v. Earle*, 5 Allen (Mass.), 22; *Spoor v. Spooner*, 12 Met. (Mass.), 281; *McMasters et al. v. West Chester Ins. Co.*, 25 Wend., 379, 381; *Smith v. Putney*, 18 Me., 87, 91, and *Walker v. Sawyer*, 13 N. H., 191, 196.

The practice was within the discretion of the court and could be exercised by it even against the objection of both parties. *Spurr v. Shelburne*, 131 Mass., 429; *Barstow v. Sprague*, 40 N. H., 27, and *Walker v. Bailey*, 65 Me., 354.

When these special findings were irreconcilably inconsistent with the general verdict, or the answers to the interrogatories showed that the verdict was founded upon unsubstantial grounds or a misconception of the case, the verdict was set aside. 28 Am. & Eng. Ency. Law (1 ed.), 397; *Richardson v. Weare*, 62 N. H., 80; *Pierce v. Woodward*, 6 Pick., 206, and *Parrott v. Thacher*, 9 Pick., 426.

Many of the states now have statutory provisions, similar to those of this state, requiring the court on the request of the parties to direct the jury to find specifically upon particular questions of fact, and return their findings of facts with the general verdict. These statutory provisions do not affect the discretionary power of the court to require the jury to return with the general verdict findings of certain facts, which power had been recognized by the court before the enactment of the statute, but only extended the right to the parties to demand their submission. Both are in

the interest of justice, in order to determine whether the general verdict of the jury is based upon the real issues joined in the action. The trial court should have power equal with that of the attorneys to direct the procedure in the trial of a cause before it.

The right of the court upon its own initiative to require the jury to return specific findings of facts with a general verdict has been affirmed in a number of states having statutory provisions giving to either party the right to request the court to direct a jury to make such findings and return them with their general verdict.

Those returned by direction of the court will have the same effect upon the general verdict as those submitted by request of the parties. 2 Thompson on Trials (2 ed.), Section 2673.

The statute, Section 11463, was adopted from the statute of Indiana on the same subject, and the presumption is that it was adopted with reference to the construction placed upon the Indiana statute by the courts of that state. *Gale v. Priddy*, 66 Ohio St., 400, 405.

The supreme court of that state has held that under their statute, the trial court had the right to submit interrogatories to the jury to be answered by it in case a general verdict is returned.

"The court may, of its own motion, propound to the jury interrogatories to be returned with the general verdict." *Senhenn v. City of Evansville*, 40 N. E. Rep., 69 (140 Ind., 675); *Killian et al. v. Eigenmann*, 57 Ind., 480; *Louisville, N. A. & C. Ry. Co. v. Worley*, 107 Ind., 320, 7 N. E. Rep.,

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215, and *Halstead v. Woods*, 48 Ind. App., 127, 95 N. E. Rep., 429.

We think, in the instant case, the court did not err in submitting to the jury these interrogatories, but was within the discretionary right of the court.

An examination of these interrogatories shows that they were all, except the first and fourth, subject to the objection that they were not findings of facts alone, but mixed findings of fact and law. *The Brier Hill Steel Co. v. Ianakis*, 93 Ohio St., 300.

The fourth interrogatory and its answer are not material to any issue in the case.

The first interrogatory and its answer read as follows:

"State, if possible, the nature and extent of decedent's intoxication? A. He was intoxicated but not to the extent that he did not know what he was doing at the time of getting off of the car."

We have examined the evidence in this case, and, while the decedent was under the influence of intoxicating liquor at the time he boarded and remained on defendant's car, yet there was nothing in his conduct that would indicate or notify the conductor of defendant company that he was in a helpless condition, or in fact was not in a condition to know where he was and his surroundings and to fully care for himself.

We think that the answer of the jury to this interrogatory is fully justified by the evidence.

He was asked to leave the car because he had not paid his fare. He said he had a ticket, but neither produced the ticket nor offered to pay his fare in case he could not find it; and when re-

requested to leave the car he did so. He was requested to leave the car and did leave the car at a regular stop of the defendant company for discharging and receiving passengers, and where other passengers were alighting from the car. After this he went upon the private right of way of the defendant company, and was there struck and so injured by another car of defendant company that he died. There is no testimony tending to prove that defendant's employes, in charge of the car which actually inflicted the injury that caused the death of plaintiff's intestate, were in any way negligent. An electric railroad company operating its cars in the open country is not negligent in requiring an intoxicated man to leave its car in the night time, for the nonpayment of his fare, at a regular stop for discharging and receiving passengers on a public highway, when he, although noticeably intoxicated, was able to walk and talk intelligently. 4 Elliott on Railroads (2 ed.), Section 1637; *Roseman, Admr., v. Carolina Cent. Rd. Co.*, 112 N. C., 709, 16 S. E. Rep., 766, 19 L. R. A., 327, 34 Am. St. Rep., 524; *Korn v. C. & O. Ry. Co.*, 125 Fed. Rep., 897, 63 L. R. A., 872; *Bageard v. Consol. Traction Co.*, 64 N. J. L., 316; *Smith v. Norfolk & So. Rd. Co.*, 114 N. C., 728, 25 L. R. A., 287, and *Woods v. Commissioners*, 128 Ind., 289, 291.

The railroad company was not required to anticipate that any injury would result to plaintiff's intestate from its requiring him to leave the car at this place after a failure to pay his fare.

After a full consideration of all the evidence we think the judgment of the court below is manifestly

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right, and for that reason we are not authorized to reverse the judgment.

The judgment of the court below is affirmed.

Judgment affirmed.

METCALFE, J., concurs.

SPENCE, J., dissents.

THE OHIO TRACTION CO. v. WASHINGTON.

Negligence — Joint tort-feasor — Action for damages — Workmen's compensation law.

The receipt of money by an injured employe from the state liability board of awards by virtue of the workmen's compensation law is not a bar to an action for damages against a person other than the employer whose negligence contributed to the injury.

(Decided June 19, 1916.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Kinhead & Rogers, for plaintiff in error.

Messrs. Fulford, Shook, Wilby & Fricke, for defendant in error.

JONES, E. H., P. J. The receipt of money by an injured employe from the state liability board of awards by virtue of the workmen's compensation law is not a bar to an action for damages against a person other than the employer whose negligence contributed to the injury, there being no provision

in said act making the remedy therein provided exclusive. The rule that settlement with one joint tort-feasor is a bar to recovery from the other has no application and cannot be invoked in such a case.

The presence of the piece of timber in the courtroom was within the discretion of the trial judge, and, while the prominence given it during the trial may have been unusual, it was not error upon which a reviewing court could bottom a judgment of reversal.

We find no error in the proceedings in the superior court, and its judgment will be affirmed.

Judgment affirmed.

JONES, OLIVER B., and GORMAN, JJ., concur.

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Strock v. Strock et al.

STROCK v. STROCK ET AL.

Wills—Construction—After-acquired realty—Residuary clause controls, when.

A will containing the general residuary clause, "the balance and remainder of my property of every kind and description I give and bequeath," etc., covers after-acquired real estate, and in an action for partition of said real estate it will be treated as having passed under the residuary clause.

(Decided March 19, 1917.)

ERROR: Court of Appeals for Richland county.

Mr. James W. Galbraith, for plaintiff in error.

Mr. James P. Seward and Messrs. Kramer & Jarvis, for defendants in error.

HOUCK, J. The parties to this proceeding in error stand here in the same relation to each other as they stood in the court below.

This is an action brought by George W. Strock for the partition of certain real estate, described in the petition of the plaintiff, of which the testatrix, Mary Elizabeth Clark, died seized; but said real estate was acquired by her after the execution of her last will and testament.

The conceded facts are as follows: On April 4, 1910, Mary Elizabeth Clark, who then owned no real estate, made and executed her last will and testament. Her estate at the time, as specifically described in her will, consisted only of mortgage securities, bonds, stocks, money loaned, and cash in bank, from which personal estate she gave and

bequeathed certain money bequests, amounting to about \$8,800, leaving a balance of personal property in the sum of \$10,000, which would pass under a residuary clause of her will. About two and a half years after the execution of her will she purchased the real estate described in the petition of plaintiff, and at the time of her death was seized of same. Said testatrix never reexecuted or republished her will. The residuary clause of her will, above referred to, is as follows:

"Item 10. The balance and remainder of my property of every kind and description I give and bequeath to Curtis King and his wife, Jennie King, and to Roy Sipe and his wife, Alice Sipe, share and share alike; that is, to Curtis King and his said wife the one-half of the amount left after all of the above gifts, and to Roy Sipe and his said wife the other half remaining after all of the above gifts."

The only question to be determined in this case is, Does the real estate acquired by the testatrix subsequent to the making of her will pass by the terms and provisions thereof? This question must be solved by a proper, true and correct interpretation of the terms and provisions of the will now before us for construction; but in arriving at the intention of the testatrix it is not necessary to construe the entire will and all of its provisions if the question to be determined can be ascertained from one clause thereof, which we think it clearly can in the instant case, the clause being the residuary clause as contained in "Item 10." Counsel for plaintiff in error urges that the will before us be construed according to certain rules of construc-

tion, and in his printed brief cites many of these rules upon which he relies. True, we have well-settled rules for the construction of wills, such as the following: (a) The intent of the testator, the guide in the construction of a will, is to be gathered from a consideration of the entire instrument. (b) The whole will must be construed together, and in the light of the whole will and all the surrounding circumstances each clause is to receive its interpretation. (c) Nothing is more clearly settled or of more frequent application in the construction of a will than the rule requiring the intention of the testator to be gathered from all its parts and not from isolated passages. These rules are sound, but are applicable only when the language used in the will is ambiguous, indefinite and uncertain, or where different items or clauses of the same will relate to the same subject-matter, and then it becomes necessary to consider the entire will or different items therein in order to ascertain the intent of the testator. But no such case is presented here, for the reason that but one item of the will is necessary to be construed for the purpose of ascertaining whether or not the real estate in question passed by devise. Section 10579, General Code of Ohio, provides as follows:

"Any estate, right or interest, in lands or personal estate or other property acquired by the testator after making his will, shall pass thereby, as if held or possessed at the time it was made, if such manifestly appears by the will to have been his intention."

Let us inquire: Does the language used in Item 10 of the will before us plainly and manifestly

show upon its face an intention on the part of the testatrix, Mary Elizabeth Clark, to devise her after-acquired real estate? We think so. The language contained in this item of the will must be interpreted to mean just what is expressed therein by the words and language used. The mere fact that we can not understand why the testatrix so provided, or that such provision is different from what was or might have been expected, will not warrant or justify putting a construction on said language different from the plain meaning of the words used. The language is clear, plain and unambiguous, and we are bound to hold that the intention of the testatrix, as manifestly shown by the language used in Item 10 of her will, was to devise all after-acquired property of which she might die seized. It seems to us that this is the natural and ordinary meaning and import of the language thus used. To us it seems clear that the language employed is such that there can not be any doubt as to its being a general residuary clause: "The balance remaining of my property of every kind and description I give and bequeath," etc.

We feel that the law is well settled that such words in the residuary clause of a will wholly and entirely preclude an interpretation to die intestate as to any property of which the testator may die seized. The learned counsel for plaintiff in error relies upon the case of *Wright, Admr., v. Masters et al.*, 81 Ohio St., 304. We have examined it with much care and can not agree with the claim thus made. A careful reading of the opinion in the above cited case, at pages 312 and 313, clearly dis-

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closes the fallacy of counsel's contention. Judge Crew, speaking for the court in said case, says:

"This rule of the common law has, however, been so far modified by statute [Section 10579, General Code] in this state that property acquired by a testator subsequent to the execution of his will, shall pass thereby, if, from the will itself, it shall appear with sufficient clearness that such was the intention of the testator. * * * The language of this statute clearly indicates its limitation, and shows it to have been the purpose of the legislature to restrict its operation to those cases where the intent of the testator to pass after-acquired property is clearly and sufficiently disclosed in his will. Hence, in every instance, the question involved becomes one of construction, and the intent of the testator must be sought in the will itself. The will under consideration in the present case makes no reference whatever in any of its provisions to after-acquired property. The property therein devised by item one to Mary Masters during her life is definitely designated and specifically described, and there is in the provisions of said will no hint or suggestion anywhere of a purpose on the part of the testator to give her more than the property thus specifically described. This will contains no residuary clause, and there is in it no clause, either general or specific, under which the property in controversy would or could pass to Mary Masters as devisee, even if the testator had owned the same at the time he executed said will."

It will be seen that in the case of *Wright v. Masters et al.* the will contained no residuary clause, and there was no provision in it, either general or

specific, whereby after-acquired property would or could pass to the claimed devisee. But not so in the case at bar. We do find a residuary clause which is specific, definite and certain, and which by the plain language used devises "the balance and remainder of my [testatrix's] property of every kind and description." We therefore are of the opinion that the doctrine laid down in the case of *Wright v. Masters et al.*, *supra*, is one which seems to us to be directly in point and decisive of the case at bar, and instead of it being favorable to the contention of plaintiff in error in this case we are free to say that it is directly in point and fully bears out the claim of the defendants in error.

We wish to call the attention of counsel to the case of *Newton v. McKinstry*, 16 C. C., N. S., 219. A careful examination of this case as to the facts and the law, as laid down by the learned judge in the opinion, leads to the conclusion that it is a case directly in point with the instant case, and that the doctrine enunciated therein is also decisive of the question before us.

In view of what we have already said we hold that the will of Mary Elizabeth Clark passed the real estate in controversy, which was acquired by her after the execution of her will. Thus finding, it follows that the judgment of the common pleas court must be affirmed.

Judgment affirmed.

POWELL and SHIELDS, JJ., concur.

BEIGHT v. ORGAN ET AL.

Wills—Estates by devise—Estates by purchase—Ancestral and nonancestral property.

Where a testator in his last will and testament provides as follows: "I give, devise and bequeath to my daughter, A. Y., my farm in Poland Township, on which I now reside, consisting of one hundred acres of land, to her and her heirs and assigns forever, providing she pay to the executor or executors of my estate, the sum of four thousand dollars. * * * The money arising from the sale of my farm, as hereinbefore bequeathed to my daughter, A. Y., * * * shall then be divided share and share alike. * * * I do hereby nominate and appoint my son J. Y., without bond, executor of this, my last will and testament, and give him full power to convey my farm to my daughter, A. Y.," the payment by the daughter of the \$4,000 creates and invests said daughter with an estate by purchase and not by devise.

(Decided March 14, 1917.)

APPEAL: Court of Appeals for Mahoning county.

Mr. J. J. Boyle, for plaintiff.

Messrs. Craver & Diser, for defendants.

FARR, J. This cause comes into this court on appeal from the court below. Adam Yarian, late of Poland township, Mahoning county, died testate August 31, A. D. 1910, and thereafter his last will and testament was duly admitted to probate in the probate court of Mahoning county. Said decedent was twice married. His first wife left one child surviving her, Rebecca Yarian Beight, who, at her decease, left the following named children: Albert J. Beight, Rolandus E. Beight and Mary C. Organ.

By the second wife, whom testator survived, the following named children were born: John Yarian, Elizabeth Crum, Samantha Rummel, Anna Yarian and Jonas Yarian.

By the terms of said last will and testament it was provided among other things, in Item II, as follows:

"I give, devise and bequeath to my daughter, Anna Yarian, my farm in Poland Township, on which I now reside, consisting of one hundred acres of land, to her and her heirs and assigns forever, providing she pay to the executor or executors of my estate, the sum of four thousand dollars, on or before three years from the date of my decease."

And in the second paragraph of the same item the following language is used:

"The money arising from the sale of my farm, as hereinbefore bequeathed to my daughter, Anna Yarian, and all my personal property, movable property, household furniture and money and valuable papers, which I leave at my decease, shall then be equally divided, share and share alike
* * *

And at the conclusion of said will it is provided as follows:

"I do hereby nominate and appoint my son, Jonas Yarian, without bond, executor of this, my last will and testament, and give him full power to convey my farm to my daughter, Anna Yarian, or if she should not elect to take the farm at the price mentioned, then my executor shall sell the farm to the purchaser or purchasers, the same as I could have done if I were living."

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Jonas Yarian qualified as executor of said will, and Anna Yarian, having elected to take said farm upon the conditions above named, paid to said executor the sum of \$4,000 and received in turn from him a deed for said farm, dated April 3, 1911, which deed is now of record in Mahoning county. The said Anna Yarian died June 3, 1911, unmarried, intestate and without issue, and left surviving her the above-named brothers and sisters of the full blood, her only heirs at law.

Jonas Yarian qualified as administrator and duly administered her estate. The farm was sold and the proceeds distributed equally among her brothers and sisters above named.

Albert J. Beight, son of Rebecca Marian Beight, sister of the half blood of decedent, Anna Yarian, filed a petition for partition in the court below on April 4, 1915, claiming to be a tenant in common of said Poland township farm, alleging that it was an estate by devise, instead of by purchase, and therefore ancestral rather than nonancestral property. To this petition general denials were filed by the brothers and sisters of Anna Yarian, deceased. Judgment was rendered for defendants in the court below, and the case is appealed to this court.

The whole issue made is whether the above-quoted language of said will creates an estate by "devise" or "purchase;" if by devise it is ancestral property, and Section 8573, General Code, applies; if by purchase it is then nonancestral property, and Section 8574, General Code, applies.

Counsel for appellant, in a well-prepared brief and in oral argument, cites and relies upon paragraph 3 of above Section 8573, which provides

that if an intestate leave no husband or wife an ancestral estate shall pass to and vest in the brothers and sisters of the blood of the ancestor from whom the estate came, or their legal representatives, whether of the whole or half blood, and it is urged that the foregoing taken in connection with the fore part of said Item II, "I give, devise and bequeath to my daughter, Anna Yarian, my farm in Poland Township," is sufficient to determine it to be ancestral property.

And it is further urged that in order that defendants may prevail it must be absolutely determined that said estate came to Anna Yarian, not by descent, devise or deed of gift, as provided in said Section 8573, General Code; or, in other words, counsel relies partly on the above wording, "I give, devise and bequeath," to determine the issue here.

The foregoing is and long has been the usual and customary language used as introductory to an item of a will, and might be determinative of the issue, if no other and different language were used. It must be observed, however, that to determine the meaning of a will it must be read and considered all together, and the later language, if different from that which precedes, must prevail.

Counsel for appellant cites *Patterson v. Lamson*, 45 Ohio St., 77, which does not seem in point with the case at bar, unless it be paragraph 4 of the syllabus, which holds that where a father purchased and paid for land for a wedding gift to his daughter, and the vendor conveyed directly to the daughter, and the daughter died intestate and without issue, the title did not come to her by deed of gift from an ancestor. Nor is the case of *Brower*

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et al. v. Hunt et al., 18 Ohio St., 311, believed to be in point. The 27 Am. & Eng. Ency. Law (2 ed.), 300 and 303, is cited to support the contention that the character of the estate is determined by the legal title, and numerous Ohio cases are quoted as sustaining that view, which is correct, but does not determine the issue here, for, while equities are inheritable, the course of descent is controlled by the legal title. Many other Ohio cases are cited, together with 1 Rockel's Ohio Probate Practice, Sections 907 to 912, all of which discuss and properly define estates by "devise," but do not clarify the mental atmosphere in the case at bar because the term "devise" is defined only generally and abstractly, and by no means in a comparative sense with the term "purchase," as is necessary in the case at bar. The foregoing authorities therefore must be held to apply the word "devise" in its generally accepted sense, which is defined in 1 Bouvier, at page 861, as follows: "*Devise*. A gift of real property by a last will and testament."

In 3 Words and Phrases, page 2047, it is defined: "The term 'devise' is the proper term to be used in a will to denote a gift of real property." And many cases are cited in which it is so defined.

"A devise is a gift of real property by a last will and testament." *In re Dailey's Estate*, 89 N. Y. Supp., 538, 48 Misc. Rep., 552; *Hatheway v. Smith*, 79 Conn., 506, 65 Atl. Rep., 1058, and 2 Words & Phrases (2 Series), 29.

And so the authorities might be multiplied.

Was the farm a gift to Anna Yarian, or did the testator use the term "devise" in a broader sense, or inadvertently?

"Purchase" is defined in 3 Bouvier, page 2771, as follows:

"*Purchase*. A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. 2 Washb. on R. Prop., 5th ed. *401; *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568; *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516. A title by purchase is one that is vested in a person by his own act or agreement; 2 Blk. Comm. 241. A title by devise is a title by purchase; *Allen v. Bland*, 134 Ind. 78, 33 N. E. 774.
* * *

"In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money or some other valuable consideration. Cruise Dig. tit. 30, §§ 1-4. *Hurst v. Dipppo*, 1 Dall. (U. S.) 20, 1 L. Ed. 19."

See also 32 Cyc., 1264, 1265 and 1267; *Cobb v. Webb*, 26 Tex. Civ. App., 467, 64 S. W. Rep., 792; 8 Words & Phrases, 6983; *Grant v. Bennett*, 96 Ill., 535, and 4 Words & Phrases (2 Series), 61.

In *Carder v. Commissioners of Fayette County*, 16 Ohio St., at page 368, it is said: "Every lawyer knows, that title by *purchase* is title by any means except descent, and, of course, includes title by devise."

The foregoing are partly common-law definitions, but the common law is the basis of the Ohio statutes on the same subject, except the statutes limit or extend the provisions of the common law, as the case may be, and the foregoing are principally for the purpose of comparison. The Eng-

lish common law has been so far modified in this state as to create the two classes by statute, ancestral and nonancestral property; and thus Walker defined them in his American Law (10 ed.), at page 392:

"I am here speaking of the doctrines of the English law. In this country, or at least in this state, they have been so far altered, that ancestral property, as will be seen hereafter, includes all realty acquired from an ancestor, either by descent, devise, or deed of gift, where blood is the only consideration; and purchased property includes realty acquired in any other way."

And continuing, the author very pertinently observes, at page 410, as follows:

"By *ancestral property*, then, is meant that realty which came to the intestate from his ancestor, *in consideration of blood*, and without a pecuniary equivalent, and which must have come either by descent or devise from a now dead ancestor, or by deed of actual gift from a living one."

The foregoing is unmistakably to the effect that *ancestral* property is property acquired where blood is the *only* consideration.

And again the author observes as follows:

"And by *nonancestral property* is meant all personality, and that realty which came to the intestate in any other way, whether by purchase from his ancestor or from a stranger, for an equivalent paid, or by actual gift from a stranger, so that the consideration of blood is out of the question; for this makes the sole distinction."

In the foregoing the author amplifies his definition, making his distinctions very clear. Therefore,

"ancestral" property under the Ohio statute is property which comes from an ancestor, the *only* consideration for which is "blood" or relationship, and *without* a *pecuniary equivalent*. "Non-ancestral" property comprehends all other kinds, and there is no refuge from that conclusion. The foregoing is supported by the above author at pages 391, 410 and 411, and by 27 Am. & Eng. Ency. Law (2 ed.), page 301, where it is said:

"'New Acquisitions' and 'Acquired Estates' — By new acquisition is meant an estate which the intestate acquired by his own exertion or industry, or by will or deed from a stranger to his blood. In other words, it is an estate obtained by any means other than by descent, gift, or *gratuitous devise* from an ancestor."

The farm here in question was not a *gratuitous devise*; it was therefore a "new acquisition." *West v. Williams*, 15 Ark., 682; *H. C. Frick Coke Co. v. Laughead*, 203 Pa. St., 172, 52 Atl. Rep., 172, and *Brewster v. Benedict et al.*, 14 Ohio, 368.

In the case of *Martin et al. v. Martin*, 135 S. W. Rep., 348 (98 Ark., 93), it is held that land is considered a "new acquisition" if derived from any source other than by descent, devise or gift from any relative in the parental line, as by a son from father or mother for a valuable consideration. Frauenthal, J., in the opinion, at page 351, observes as follows:

"If the estate is obtained by any means other than descent, gift, or *gratuitous devise*, then it is a new acquisition."

Other parts of that opinion are to the same effect. And the case of *Brown v. Whaley et al.*, 58

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Ohio St., 654, is cited, the syllabus of which reads as follows:

"A deed of real estate from a father and mother to their daughter, 'in consideration of our love and affection for our daughter, and in consideration of the dutiful obedience and faithful services to us of our daughter and in further consideration of one dollar to us in hand paid by our said daughter,' is not a deed of gift, and the title acquired under such deed came to the daughter not by deed of gift but by purchase."

At pages 665 and 666 of the *Brown v. Whaley* case, Burket, J., in the opinion, quotes, with manifest approval, the above paragraphs from Walker's American Law, and further observes as follows:

"How then shall it be solved when the considerations are thus mixed. The title came either by deed of gift or by purchase. It could not come by both; and legally speaking, it could not come partly by deed of gift and partly by purchase. The law as above quoted from Walker solves the question. He says, that to make ancestral property * * * there must be no other consideration than that of blood. Here there was other and additional consideration, and therefore the title came not by deed of gift. As the title came not by deed of gift, it came by purchase. * * *

"Moreover, the consideration of one dollar alone, is sufficient to support the deed as between the parties, and to give it the character of being upon a valuable consideration, as contra-distinguished from a good consideration."

It is true that the foregoing is merely *dictum*, but it clearly indicates by what process of reasoning a conclusion was reached, and is in point in the case at bar.

Adam Yarian provided that his daughter should pay to his executor or executors the sum of \$4,000, and upon that condition and no other she should receive a deed from his executor, for which deed he had a perfect right to make provision, and which was in full keeping with his own definitely expressed purpose, as stated in the second paragraph of Item II: "The money arising from the sale of my farm."

Adam Yarian regarded it as a sale, for he expressly so stated; and very properly so, for by no process of reasoning could it be considered a *gratuitous devise*. No doubt the testator believed that his daughter Anna was getting her share of his estate in excess value above the \$4,000; but, if so, it is not determined or divisible here. All that the will carried as gratuitous to Anna was the option in her favor to purchase at the price fixed. She elected to take under said option, paid the price, received a deed, and beyond question took the estate by purchase, making it nonancestral property. But suppose it should be held to be ancestral property; the effect of such holding would be to divert \$4,000 of the estate of Anna Yarian, deceased, from its proper channels of descent, to the estate of Adam Yarian, deceased, from which it must follow partly different lines of descent, thereby working injustice and injury to the heirs of Anna Yarian. Such is contrary to the spirit of the laws relating to such property in this state.

Judgment is therefore rendered for defendants, and the petition is dismissed.

Petition dismissed.

POLLOCK and METCALFE, JJ., concur.

PAPPALARDO ET AL. v. PAPPALARDO.

Error — Divorce — Alimony — Evidence — No appeal or review by error of a divorce decree — Decree of divorce not conclusive in alimony proceedings as to validity of marriage.

1. No appeal or review by error proceedings of a divorce decree can be had.
2. In the prosecution of error or appeal in a suit involving the right to alimony on the part of the wife, the parties are not concluded by a decree of divorce, previously rendered, so far as the validity of the marriage is concerned.
3. In a suit for alimony where the defendant claims that he was never legally married to the plaintiff, for the reason that he had a first wife still living at the time plaintiff claimed the marriage took place and that no divorce had been had between such first wife and the defendant, it is error to refuse to permit the defendant to testify as to his former marriage and to exclude the testimony of witnesses who were present at the church and witnessed the former wedding.

(Decided January 8, 1917.)

ERROR: Court of Appeals for Hamilton county.

Mr. Charles Ginocchio; Mr. Jesse M. Simon and Messrs. Hackett, Yeatman & Harris, for plaintiffs in error.

Mr. Joseph B. Derbes and Mr. Gideon C. Wilson, for defendant in error.

JONES, OLIVER B., J. This is a proceeding in error in which it is sought to have this court review the judgment of the court of common pleas, division of domestic relations, granting a divorce and alimony.

Previous to the recent amendment of the constitution, under which the jurisdiction of the court of appeals was fixed, it has consistently been held, under the different forms of the divorce statute, that no appeal or review by error proceedings of a divorce decree could be had; and this rule was established as a matter of public policy, because of the inherent nature and effect of the decree of divorce, rather than because of the terms of the statute. *Bascom v. Bascom*, 7 Ohio (pt. 2), 125; *Laughery v. Laughery et al.*, 15 Ohio, 404; *Tappan, Jr., v. Tappan*, 6 Ohio St., 64; *Parish v. Parish*, 9 Ohio St., 534, and *Mulligan v. Mulligan*, 82 Ohio St., 426.

The terms of Section 6, Article IV of the Constitution, as amended September 3, 1912, as construed by the supreme court in the case of *Cincinnati Polyclinic v. Balch*, 92 Ohio St., 415, broadly taken, might authorize and require a review even of a decree of divorce, as was indeed suggested in the dissenting opinion of Nichols, C. J., at page 424; but considering the uniform rule that has existed in this state up to this time we are loth to hold that such change was intended by the amendment to the constitution, and therefore declare that in our opinion the judgment for divorce is not subject to review by this court.

The same rule, however, has not obtained with respect to a judgment for alimony, and this court

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in the instant case has jurisdiction to consider that part of the judgment below which related to the subject of alimony.

The amount and method of payment of the alimony allowed by the court below is not criticised by plaintiffs in error, but the contention is made that no valid marriage between the defendant in error, Louise Pappalardo, and the plaintiff in error Joe Pappalardo, was established by the evidence, for the reason that said Joe Pappalardo had a first wife still living at the time defendant in error claimed the marriage took place, that such first wife was living at the time of the judgment below, and that no divorce had been had between her and said plaintiff in error Joe Pappalardo.

It is however contended by the defendant in error that the question as to the marriage has been conclusively settled by the decree of divorce rendered in the court of common pleas, and that, if that decree cannot be disturbed by review in this court, the parties are concluded by it so far as the validity of their marriage is concerned, upon which is predicated the right to alimony on the part of the wife.

We are unable to grant this contention, however, because if this court is authorized to review the matter of the judgment below so far as it related to alimony, which review could in no way disturb the divorce, the judgment below must not be deemed conclusive in any way as to the right of defendant in error to secure alimony. The point contended for, as to the conclusiveness of the divorce judgment fixing the right to alimony, was raised in the case of *Cox v. Cox*, as found in

19 Ohio St., 502. The only difference between that case and the one under consideration here is that that case came into the district court from the common pleas court by appeal, while the instant case comes into this court on error. In *Cox v. Cox* the supreme court held that the effect of the appeal was to reopen for trial in the appellate court all the issues of fact upon which the rights of the parties with respect to alimony depended. The same rule would apply here and permit the court to review all of the issues between the parties upon which the right to alimony depends. It is not necessary, however, for this court to determine the weight of the evidence or the question as to whether or not plaintiff below might, under all the facts shown by the record, consideration being given the rule laid down in *Vanvalley v. Vanvalley*, 19 Ohio St., 588, be entitled to alimony.

The record clearly discloses that the court below erred in regard to the admission of evidence, in refusing to permit the defendant Pappalardo to testify as to his former marriage, and also in refusing to admit the testimony of Angelo Zapulla and Dominick Bosca, offered to show that they were present at the church and witnessed the former wedding of Pappalardo.

In the case of *Wolverton v. State of Ohio*, 16 Ohio, 173, it was held that the admissions of the defendant to a prior marriage might be given in evidence to prove the fact of such marriage in a trial for bigamy. Birchard, C. J., on pages 177 and 178, used the following language:

"It is said on behalf of plaintiff that the ruling of the court was in conflict with the well-established

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rule requiring the best evidence to be produced of which the nature of the case admits, and that, by the law of the State of Michigan, records are required to be kept of all marriages, and that the prosecutor should have been required to produce the record. Upon this theory, it would follow that the marriage could not be proved by a person present at the ceremony; and yet such proof is always admissible."

In *Miles v. United States*, 103 U. S., 304, it was held that the trial court, on an indictment for bigamy, properly admitted the declarations and admissions of the husband to prove the facts of his first marriage, and the supreme court approved the charge of the trial court to the effect that the declarations of the accused were evidence proper to be considered by the jury as tending to prove an actual marriage; that such marriage might be proven, like any other fact, by the admissions of the defendant or by circumstantial evidence; and that it was not necessary to prove it by witnesses who were present at the ceremony. In the opinion of the court, at page 311, it is said:

"To hold that, on an indictment for bigamy, the first marriage can only be proven by eye-witnesses of the ceremony, is to apply to this offence a rule of evidence not applicable to any other.

"The great weight of authority is adverse to the position of the plaintiff in error."

In *Umbenhower v. Labus*, 85 Ohio St., 238, which was a case involving the validity of a common-law marriage and the legitimacy of a child, it was stated at page 244 of the opinion of the court, rendered by Judge Price, that the state

recognizes marriage as a civil contract, and that "it may be proved by competent parol proof and circumstances when the degree of proof is clear and satisfactory to the court or jury."

In 1 Bishop on Marriage, Divorce and Separation, Sections 1047, 1048 and 1049, the rule is laid down that it is competent to prove the fact of a marriage by the clergyman or other official person by whom it was solemnized, by the testimony of one who was present, or by either of the parties, when they are not incompetent witnesses. In Section 1050 it is stated:

"Proof by witnesses present has been deemed better than by record. Yet in law either will in any case suffice."

The record in this case fails to show the state of the law in Italy, where defendant claimed to have been first married, in regard to the essentials of a ceremonial marriage and its record. Defendant's counsel, however, stated that they had endeavored to procure a record of the marriage, but had failed to do so because of the existing European war seriously interfering with shipping and communication with Italy, thus furnishing an excuse for their failing to obtain and produce record evidence of the marriage.

Because of these errors in regard to the admission of testimony, the judgment below, so far as it relates to the matter of alimony, must be reversed, and the cause remanded for further proceedings.

In order, however, that the plaintiff below may not fail to secure any relief to which she may ultimately be found to be entitled, the temporary restraining order against The Union Savings Bank

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& Trust Company will be continued, subject to the further order of the court of common pleas.

Judgment reversed, and cause remanded.

JONES, E. H., P. J., and GORMAN, J., concur.

WAGNER V. WAGNER ET AL.

Trust—Evidence required to establish—Claim for funds advanced—To purchase land held jointly.

A trust can be grafted on land, held by a deed absolute on its face, only by evidence which is clear and of the most convincing character, and a claim of a lien on the proceeds arising from the sale in partition of land so held, on account of money advanced for its purchase, will be denied where the evidence as to the claim falls short of being of a clear and convincing character.

(Decided March 22, 1917.)

APPEAL: Court of Appeals for Stark county.

Mr. C. C. Upham, for plaintiff.

Mr. S. F. Bowman and *Messrs. Amerman & Mills*, for defendants.

HOUCK, J. This case is here on appeal from the common pleas court of Stark county, and was submitted to this court on the pleadings and the evidence as contained in the transcript of same taken in the court below. The pleadings in substance are as follows:

The plaintiff, Rose Wagner, filed her petition in the common pleas court of Stark county, Ohio, on April 11, 1916, alleging that she had a legal right to and was seized in fee simple of an undivided one-half interest in certain real estate described in the petition; that the defendant Mahala Wagner was the owner of the other undivided half of said premises; that the defendant John S. Wagner was the husband of said Mahala Wagner; and that the defendant James Hindman claimed to hold a mortgage on said premises. The prayer of the petition was that the defendant Hindman be required to set up his mortgage or be forever barred from doing so, and that said premises be partitioned and plaintiff's share set off to her, or that said premises be sold and her share awarded her in money, subject to a certain lease of said premises which was excluded, but still exists, and in no way interferes with the partition proceedings.

The defendant James Hindman filed an answer and cross-petition, setting up his mortgage on said premises, amounting to \$2,884.37, with interest, which he claimed was the first and best lien on said premises, and prayed judgment for the same, the sale of said premises, and that the proceeds thereof be applied on his mortgage.

The defendants Mahala Wagner and John S. Wagner filed a joint answer and cross-petition in which they admitted that plaintiff held the legal title to the one-half of said premises, that the defendant Mahala Wagner held the legal title to the other undivided one-half of said premises, and that the defendant John S. Wagner was the husband of

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said Mahala Wagner and had an inchoate right of dower in said premises. They further admitted that the mortgage of the defendant James Hindman was a good and valid lien against the premises; and, further answering, denied each and every other allegation in plaintiff's petition not expressly admitted to be true. In their cross-petition the said Mahala Wagner and John S. Wagner averred that at the time said premises sought to be partitioned were purchased the only consideration that was paid at said time was \$1,000, which was paid by the defendants Mahala Wagner and John S. Wagner; that on April 21, 1907, said defendants further paid the sum of \$800 on the purchase price of said premises; that since the 23d day of March, 1905, at which time the premises were purchased, they had paid all the taxes, which amounted to \$273.30; and that ever since said 23d day of March, 1905, the plaintiff, Rose Wagner, had occupied said premises as her home and had not accounted to these answering defendants for any of the rents and profits of the same. They therefore prayed for an accounting between said parties, that these defendants recover out of the proceeds of the sale of said premises the amounts they had paid on the purchase price, together with the taxes, and interest at six per cent., and that they be decreed their interest in said property in money and granted such other relief as they shall be entitled to in the premises.

The plaintiff filed a reply to the cross-petition of the defendants John S. Wagner and Mahala Wagner, the same being in the nature of a general

denial as to all the material allegations contained therein.

Upon the issues raised by these pleadings, and the evidence, the case was submitted to this court for its determination.

The contention of the defendants is that they paid all the money that had been paid on the lands in question, saving and excepting possibly the sum of \$500; that they also paid the taxes; and they asked that out of the proceeds of the sale of said lands they be reimbursed, according to an accounting between the parties hereto as shall be determined by the court. In other words, they seek to have impressed upon the fund arising from the sale of said premises a trust in their favor to the amount claimed to have been paid by them on said lands and for the taxes.

We think the law is well settled in this state as to what constitutes an express trust, as well as an implied trust, and the evidence necessary to sustain such. It will be seen from the issues raised by the pleadings, and the evidence submitted in support of same, that it is attempted to engraft a trust on lands held by a deed absolute on its face.

A trust can not be established by mere conjecture, or from the mere circumstances and surroundings of any particular case or state of facts, but must be established by clear, certain, definite and positive evidence, in proof not only of the existence of the trust at the time of the conveyance, but also of its terms and conditions. Therefore, the evidence necessary to engraft a trust on lands held by deed which is absolute on its face, or on

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the proceeds arising from their sale, as claimed in the present case, must be clear and of the most convincing character. This rule of law is laid down in the case of *Boughman et al. v. Boughman et al.*, 69 Ohio St., 273, the syllabus being as follows:

"Equity requires that parol evidence to engraft an express trust in lands upon a deed absolute shall clearly and convincingly show that contemporaneously with the execution of the deed the terms of the trust were declared and the beneficiaries designated."

Applying the rule of law as therein laid down to the proven facts of the case at bar we are bound to find that the claim of the defendants is not well founded as to their being entitled to recover in this action for the moneys alleged to have been paid on the real estate in question. We are bound to arrive at this conclusion after a careful examination of all the testimony and evidence offered in this case, and we are fully satisfied that it is not of such clear, positive character and nature as to warrant a court in finding that a trust had been created in the lands in question or in the proceeds arising therefrom.

But how stand the issues in this case as to the taxes and rents and profits? Without discussing these questions further than to say that from the evidence in the case and the law governing the facts so established by the evidence we are of the opinion that Rose Wagner should account for her share of the taxes to John S. Wagner, from April 18, 1912, to November 13, 1913, and account to Mahala Wagner for one-half of the rents

and profits from said lands from the date of the deed from John S. Wagner and Mahala Wagner to Rose Wagner, being November 13, 1913, and we accordingly so find.

We further find that the claim of James Hindman as to the amount due him on his notes and mortgage, as set forth in his answer and cross-petition, is undisputed, and that therefore he is entitled to a decree in his favor, as prayed for in his cross-petition. We further find that the plaintiff is entitled to a decree in her favor for partition of the real estate described in her petition, as prayed for therein.

A decree and judgment accordingly, and an entry, may be drawn by counsel in accordance with the findings herein.

Judgment accordingly.

POWELL and SHIELDS, JJ., concur.

RALSTON v. MCBURNEY ET AL.

*Specific performance—Parol agreement to compensate by will—
Execution and delivery of will—Subsequent revocation—
Original will regarded as contract—May be enforced, when.*

1. A promise, for a valuable consideration, to make a will devising specific real estate to a certain person is valid, if evidenced as required by the statute of frauds, and, upon failure to perform the promise, specific performance may be had against any one having the title thereto except an innocent purchaser for value.
2. A will devising real estate, executed and delivered to the devisee in pursuance of a parol agreement by which the testator for a valuable consideration agreed to devise that real estate to the devisee, can not be revoked by a subsequent will so as to escape the obligation, but may be enforced as a contract.

(Decided April 5, 1917.)

APPEAL: Court of Appeals for Carroll county.

Mr. W. L. Handley and Mr. U. C. DeFord, for plaintiff.

Messrs. McDonald & Oglebee, for defendants.

POLLOCK, J. This case comes into this court on appeal from the court of common pleas of this county, and is submitted to the court on the pleadings and the evidence.

The action was begun in the court of common pleas by Levi Ralston, plaintiff, against Elizabeth McBurney and T. C. and Levi Blacklege, defendants, to prevent them from disposing of the real estate described in the petition, alleging that there was an agreement between Elizabeth McBurney and plaintiff, by which, for a valuable consideration, she agreed to convey this property to him by

her will; that subsequently Miss McBurney, in pursuance of this agreement, made her will and delivered it to Ralston, devising to him this real estate; that after the making of this will Miss McBurney, by deed of trust, conveyed the land described in the petition to her codefendants, T. C. and Levi Blacklege, and made a second will devising this property to other parties and revoking the prior will; and that Elizabeth McBurney conveyed this property by deed of trust and made a second will for the purposes of fraudulently avoiding her contract and defeating plaintiff's right to the property under the agreement.

Before the trial of the action in the court below Elizabeth McBurney died and her codefendants were appointed executors of the second will.

Plaintiff by amended petition then prayed that the property devised to him by the first will be decreed to him in accordance with the agreement made between him and Miss McBurney.

The answer of the defendants, so far as we are now concerned, is a denial of the material allegations of the petition.

Elizabeth McBurney's deposition was taken prior to her death and admitted in evidence, and plaintiff Ralston testified at the trial. There is a sharp conflict in the testimony in regard to the agreement for the purchase and conveyance of the property described in the petition. We will not set out or attempt to discuss the testimony, but only the facts relating to the transaction as we have found them from the testimony.

Elizabeth McBurney was a maiden lady without any near relatives. For some time prior to 1898

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Miss McBurney had been taking care of a man and his wife by the name of Patterson. Mr. Patterson died in that year, and by his will he devised property to Elizabeth McBurney to about the amount of \$2,500. Near the time of the death of Patterson, Ralston commenced to look after the business affairs of Miss McBurney. Mrs. Patterson was an invalid requiring constant care, and, after the death of Mr. Patterson, Elizabeth McBurney continued to take care of Mrs. Patterson, until about 1899. After the death of Mr. Patterson, Thomas Donaldson had been appointed guardian of Mrs. Patterson, and at the date above referred to trouble arose between the guardian and Miss McBurney about the care of Mrs. Patterson, and the compensation therefor. A settlement was arrived at between the guardian and Miss McBurney, Ralston, the plaintiff, representing Miss McBurney. In that settlement Miss McBurney was paid through Mr. Ralston \$100 in money and a note given by the guardian for \$443. After this settlement Miss McBurney gave Ralston \$500 out of the amount received in that settlement for the services he had then rendered her. Mrs. Patterson died in January, 1899. Soon after that, Mr. Donaldson, representing the heirs of Mrs. Patterson, offered the property described in the petition at public sale. Prior to the sale Elizabeth McBurney and Ralston agreed between themselves to purchase this property jointly, if it could be done for not over \$1,600. At this sale it was bid off by Ralston at \$1,500.

After this property was bid off by Ralston, and before the deed was made, Ralston and Miss McBurney entered into a further agreement in regard

to the property, by which it was agreed that the property should be conveyed by the heirs of Mrs. Patterson to Miss McBurney and that Ralston was to apply the \$500 already received from Miss McBurney for services to the payment of the purchase-money; that Miss McBurney was to furnish \$775 and Ralston add \$25 to it; that \$200 should be borrowed by Ralston, and Ralston was to care for the property during the lifetime of Miss McBurney and attend to any other business that she might desire; and that after paying from the proceeds of the property the \$200 borrowed to complete the purchase-money Miss McBurney was to have the entire use of the property during her lifetime and in consideration therefor was to make a will devising this property to Ralston at her death. About the first of April of that year Ralston, with the money thus furnished, paid the purchase-money and caused the property to be conveyed by the heirs of Mrs. Patterson to Elizabeth McBurney. In April, 1901, Miss McBurney made a will devising this property to Ralston in accordance with her agreement. After she had executed this will she handed it back to him with the remark, "It is of more interest to you than to me." Some time after the making of this will Miss McBurney conveyed the property described in the petition in trust to her codefendants, and also executed a second will revoking the former will and devising the property described in the petition to others than Ralston. Ralston fully performed his agreement in so far as Miss McBurney would permit him to do so.

From these facts Ralston is not entitled to have a judgment decreeing this property to him upon the verbal arrangement which was made between him and Miss McBurney that the title should be placed in her name and that then she should will it back to him. This arrangement was not engrafting a trust upon this property in the hands of Miss McBurney. But it was making a verbal agreement for the conveyance of property to Ralston by the will of Miss McBurney. Such a verbal agreement can not be enforced in this state, although the plaintiff has fully performed his part of the agreement. *Howard v. Brower*, 37 Ohio St., 402; *Crabill v. Marsh*, 38 Ohio St., 331, and *Shahan, Exr., et al. v. Swan*, 48 Ohio St., 25.

It next remains to be determined whether the plaintiff is entitled to the relief asked by reason of Miss McBurney having made and delivered to Ralston a will devising this property to Ralston in pursuance of their verbal contract, which was afterwards revoked by a subsequent will of Miss McBurney.

The provisions of the will, which plaintiff claims carry into effect the contract made, read as follows:

"I give and devise to Levi Ralston of Mechanics-town, Ohio, the thirty-five acres of land, and appurtenances thereunto belonging and known as the William P. McClain land and lying and being in the northeast corner of the southwest quarter of section twenty-nine in Fox township, Carroll county, Ohio, I give this to him absolutely as his own forever in consideration for his kind attention in looking after and taking care of and attending to my business affairs during my life time."

While the paper writing executed by Miss McBurney as her will, devising the property to Ralston in pursuance of their verbal agreement, cannot be probated as her last will, the question arises whether this provision of the will may be used in equity to specifically enforce the contract between the parties, on the ground that it is written evidence of the agreement, which complies with the statute of frauds.

A verbal contract existed between these parties by which Miss McBurney agreed to devise this land to Ralston; but before a court of equity can enforce this contract proof thereof is required by written memorandum signed by Miss McBurney. The writing is not the contract, but the evidence by which it may be proven.

Williams, J., in the case of *Heaton v. Eldridge & Higgins*, 56 Ohio St., 87, says at page 101:

"The memorandum, which is merely the evidence of the contract, may be made and signed after the completion of the agreement, and even a letter from the party to be charged, reciting the terms of the agreement, is sufficient to satisfy the requirements of the statute; but it cannot be said that the letter constitutes the agreement; that was made when the minds of the parties met with respect to its terms, and the letter furnishes the necessary evidence to prove the agreement in an action for its enforcement."

The paper writing in this case is in form of a will, but it was made for a valuable consideration, in pursuance of their prior verbal agreement, signed by the party to be charged therewith, and delivered to Ralston.

Our attention has been called to the case of *Bolman v. Overall, Exr.*, 80 Ala., 451, 60 Am. Rep., 107. The syllabus of this case reads as follows:

"1. A paper in the form of a will, executed in consideration of personal services rendered or to be rendered, or other valuable consideration, and delivered to the devisee or legatee therein named, may constitute an irrevocable contract.

"2. Such a contract is not repugnant to public policy, but may be enforced, after the death of the promisor or testator, by action for a breach against his personal representative, or, in a proper case, by bill in equity against his heirs, devisees, or personal representative."

The facts as set out in the opinion in this case are very similar to the facts in the case that we are now considering. It seems to be a well-considered case and sustains the principle, that, where a party has entered into a verbal agreement, that in consideration of services rendered or to be rendered he agrees to make his will devising certain property to the other party to the contract, when the verbal arrangement is completed by the making of a will it cannot afterwards be revoked by the testator, but may be enforced as a contract.

In the case of *Lowe v. Bryant, Admr.*, 30 Ga., 528, 76 Am. Dec., 673, where by an ante-nuptial verbal agreement the husband had agreed to afterwards make a will devising to his wife and her children all the property which he might receive from the wife, it was held that this became an executed and enforceable agreement, by the execution, after the marriage, of the will, and the hus-

band was excluded from afterwards making a different disposition of this property.

The same principle has been announced in the following cases: *Anding v. Davis*, 38 Miss., 574, 77 Am. Dec., 658; *Naylor v. Shelton*, 102 Ark., 30, 41, 143 S. W. Rep., 117, 121; *Baker v. Syfritt*, 147 Ia., 49, 125 N. W. Rep., 998; *Carmichael v. Carmichael*, 72 Mich., 76, 1 L. R. A., 586; *Maddox v. Rowe*, 23 Ga., 431, 68 Am. Dec., 535. See also 1 Schouler on Wills (5 ed.), Sec. 452.

A person may for a valuable consideration bind himself by contract to make a particular disposition of his real estate by will. *Johnson v. Hubbell*, 10 N. J. Eq. (2 Stock.), 332.

If the contract is evidenced as required by the statute of frauds, equity will decree specific performance of the contract against the heirs or devisees of the contracting party.

The supreme court of this state in *Emery et al. v. Darling*, 50 Ohio St., 160, held that specific performance should be decreed under a contract in writing whereby one sister agreed to give and bequeath to another sister all her real estate and personal property of which she might die seized or possessed, in consideration that her sister should stay with her as long as she might live.

In the case at bar the contract to compensate Ralston by devising the property to him was verbal, but the contract was afterwards carried into effect, so far as the parties could carry such a contract into effect, by Miss McBurney making her will containing a devise as provided for in such verbal contract, and delivering the will to Ralston. This will can not now be probated as a will of Miss McBur-

ney, for the reason that it is not her last will and testament, but we think it should be enforced as a contract made upon a valuable consideration. This is not enforcing a verbal agreement for the conveyance of this property, but it is treating this paper writing, purporting to be a will, as a written contractual agreement between these parties. The devise refers to the fact that it is made "in consideration for his [Ralston's] kind attention in looking after and taking care of and attending to my business affairs throughout my life time."

Minshall, J., in the opinion in *Emery et al. v. Darling, supra*, says at page 165:

"But it is of the essence of a will that its dispositions should be in the nature of gifts. Schouler on Wills § 451. When it is made to carry out or perform some obligation, made and entered into by the testator, it is not essentially a will, but in the nature of a contract, and its validity as an instrument will not in such case depend upon its conformity to the requirements of a will, but to those things which the law deems essential to the making of a valid contract."

The devise in the paper writing executed by Miss McBurney was not made as a gift, but to carry out an obligation previously entered into by her, and it conforms to all the legal requirements necessary to make a valid contract for the conveyance of real estate.

"But in equity a will which is once formally made in conformity to some agreement may be upheld as originally executed on the strength of some valuable consideration therein interposed; the effect of which might possibly be to make the will

practically irrevocable, unless some matter of form, some technical arbitrary rule springing out of the statute, or the necessary form or construction of the will should defeat what the parties had mutually intended. There is nothing unlawful in such a compact, nothing contrary to good morals." 1 Schouler on Wills (5 ed.), Section 454.

It can not be said that enforcing in equity a contract contained in this devise violates the provision of the statute of frauds. It is in writing, executed and witnessed by the party to be charged, and delivered. When one party has fully performed a verbal agreement by which the other agreed to compensate him for the consideration received by executing a will devising property to him and that agreement was carried into effect by the second party making the will and delivering it, its provisions become irrevocable and enforceable against the devisees in a subsequent will or the heirs of the party.

Judgment in favor of the plaintiff decreeing the property described in the petition to him.

Judgment for plaintiff.

METCALFE and FARR, JJ., concur.

THE R. K. LEBLOND MACHINE TOOL CO. v. THE
HUMBOLDT FIRE INSURANCE CO.

Fire insurance—Reformation of contract—Construction of written instrument—Duty of agent of insurance company.

1. Where the meaning of a written instrument is not clear, it will be construed most strongly against the person who prepared it.
2. Where through mistake, fraud or inadvertence, the agent of an insurance company fails to insert in a policy of fire insurance a proper description of the location of the risk, the court will reform the policy to make such description correspond with the intention of the parties.

(Decided June 29, 1914.)

ERROR: Court of Appeals for Hamilton county.

Mr. Robert A. LeBlond, for plaintiff in error.

Mr. J. L. Kohl, for defendant in error.

JONES, E. H., J. Plaintiff in error, who was plaintiff below, brought suit on a certain policy of fire insurance issued by the defendant company. The issues were made upon the plaintiff's fourth amended petition, which alleged that the defendant, by the policies of insurance referred to, insured the plaintiff against loss and damage by fire to the amount of \$400 on live patterns, etc., "all while contained in the building occupied by The Mowry Car Wheel Works Company, situated at the southeast corner of Eastern Avenue and Lewis street, Cincinnati, Ohio." It is then alleged that the patterns of the plaintiff on the premises of The Mowry Car Wheel Works Company were stored in two

separate buildings at the time the policy was issued, which fact, it is alleged, was known to the defendant's agent; that the intention of the parties was that the said property should be covered while located and contained not only in the building at the corner of Eastern avenue and Lewis street, but also while located and contained in the other building on the premises of the Mowry Company; and that by mistake, fraud or inadvertence the agent of the defendant company failed to include both buildings in the description of the location of the risk.

The reformation of the policy, so that the same will stipulate for insurance on the property referred to while located and contained on the premises of the Mowry Company at the southeast corner of Eastern avenue and Lewis street, Cincinnati, Ohio, is prayed for, and that after reformation is ordered plaintiff be given judgment against said defendant in the sum of \$400.

The total amount of insurance on these patterns, etc., at this time, was \$2400, which was divided among different companies who issued separate policies in amounts of about \$400 each. It appears from the evidence in this case that at the time these policies were issued, and at all times since, the patterns had been left in the custody of The Mowry Car Wheel Works Company by the plaintiff, and that about nine-tenths of the patterns were stored in the frame building which burned, and which stood a few feet away from the brick building immediately upon the corner of the two streets named.

Mr. Dillaby, a stockholder and a frequent visitor at the Car Wheel Company's plant, was at the time

engaged in the insurance business, and undertook at the request of the superintendent to obtain insurance upon said patterns, which said superintendent had been requested by the plaintiff company to secure.

We think that there is satisfactory evidence that Mr. Dillaby knew that the great bulk of these patterns were stored in the frame building, and it was unquestionably his duty and the duty of the agents of the defendant company who wrote this policy to know what it covered and where the property was located. In the absence of evidence to the contrary the company through its agents must be presumed to have known where the patterns were. The building which was destroyed, or at least a portion thereof, had been for at least 30 years, and possibly for 50 years, used exclusively for the storage of patterns. It is true that in late years some few patterns were stored in the brick building at the corner, which, according to the claim of the defendant in error, is the only building described or contemplated in the policy. In this connection see *Richards on Insurance* (2 ed.), page 53, paragraph 6 of Section 43, which reads:

"The contract of insurance having been framed by the insurers in their interest, and the insured being compelled to accept the form offered in order to secure insurance, any ambiguity as to the intent or meaning of its terms, or what properly was intended to be covered, or where situated, will be construed in favor of the insured, and with the purpose of granting him an indemnity for his loss."

This policy was written and executed by the insurance company and by it delivered to the insured,

or rather to The Mowry Car Wheel Works Company for the insured. It is a familiar rule of construction that an instrument will be construed, where its meaning is not clear, most strongly against the person who prepared it. This rule of construction, coupled with the presumption of knowledge as to the location of the patterns on the part of the defendant company, makes it appear to the court that there should be a reformation of said policy and that the court below erred in instructing a verdict for the defendant. We think that the instruction was prejudicial to the rights of plaintiff in error, and that substantial justice has not been done.

For these reasons the judgment is reversed, and the cause remanded for further proceedings.

Judgment reversed, and cause remanded.

SWING and JONES, OLIVER B., JJ., concur.

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Parthe et al. v. Parthe et al.

PARTHE ET AL. v. PARTHE ET AL.

Wills—Conditional devise—Event happening during devisee's lifetime—Dower not assignable to devisee's wife—Sale of prospective interest by devisee—Partition.

1. The surviving spouse of one who departed this life before the happening of the event which was made a condition to the taking effect of a devise in his favor, is not entitled to dower in the property so conditionally devised.
2. The sale by a contingent devisee of his prospective interest in an estate does not defeat the claim of his son to whom one-half of the said interest was devised in case death before taking effect of the devise prevented the interest vesting in the contingent devisee.

(Decided March 22, 1917.)

ERROR: Court of Appeals for Stark county.

Messrs. Pomerene, Ambler & Pomerene, for plaintiffs in error.

Messrs. Diehl & Brown and *Messrs. Amerman & Mills*, for defendants in error.

HOUCK, J. This is a proceeding in error. The parties here stand in the same position as they stood in the court of common pleas.

The action below was one in partition, wherein the plaintiffs sought to partition certain real estate described in the petition. John Leroy Parthe claimed to be the owner of the undivided one-twelfth part thereof, and Anna Parthe claimed a dower interest in the undivided one-sixth part of said real estate. An accounting for rents and profits was also prayed for in the petition.

The amended answer of the defendants contained a general denial, and further set forth that by the terms and conditions of a certain written contract entered into between Charles Parthe, prior to his death, and the defendants, Robert I. Parthe and Edward J. Parthe, they had purchased the interest of said Charles Parthe in and to the real estate sought to be partitioned, and that they, the said Robert I. Parthe and Edward J. Parthe, had fully complied with all of the terms and conditions of said written contract; that Charles Parthe and the plaintiffs had received and accepted the benefits thereunder; and that by reason thereof they are now estopped from claiming any interest in and to the real estate set out and described in plaintiff's petition. They also aver in their amended answer that if plaintiffs have any remedy and any rights under the terms of the will of William L. Parthe, Sr., such are under the jurisdiction of the probate court, and that the common pleas court is without jurisdiction in the premises.

The plaintiffs filed a reply in the nature of a general denial to all of the material allegations contained in the amended answer of the defendants.

By agreement of all the parties to the suit a jury was waived, and upon the issues thus raised by the pleadings the cause was submitted to the trial judge upon an agreed statement of facts. The court below found for the defendants and dismissed the petition of the plaintiffs, and entered judgment accordingly.

Did the trial court err in so doing, to the prejudice of plaintiffs in error, or either of them?

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This court must answer this inquiry from the agreed facts in the case, the correct application of the law pertaining to them, and the proper interpretation to be placed on Item 4 of the will of William L. Parthe, Sr.

So much of the agreed statement of facts as we deem necessary for the proper consideration of this controversy is as follows:

"William L. Parthe, Sr., and his wife, Minnie E. Parthe, lived in the city of Alliance, Ohio. William L. Parthe, Sr., owned what is known as the Parthe Block, being the property in dispute herein. William L. Parthe, Sr., had the following children: Charles, Edward J., Robert I., and William Parthe; Mary P. Moore and Lilian Bowen. On the 25th day of November, 1900, William L. Parthe, Sr., died, leaving a will. Item 4 of this will is as follows:

"I give, devise and bequeath to my sons, Charles Parthe, Edward J. Parthe, Robert I. Parthe and William L. Parthe, Jr., and to my daughters, Mary P. Moore and Lilian Bowen, the brick block situate on lot five hundred and eighteen (518) in the city of Alliance, and known as the "Parthe Block," subject to their mother's use thereof during her lifetime, and subject to the further conditions that should my said wife die within ten years from the date of my death, said brick block and the grounds on which it is situate, shall be rented, and the proceeds thereof during the remainder of the said ten years from the date of my death be divided equally between my said children, subject to the payment of taxes and the necessary repairs of said block. At the expiration of the said ten

years from the date of my death, if my said wife is then deceased, or at the time of her death, should she survive me more than ten years, the said block on lot No. 518 shall be sold by my executors, and the proceeds thereof divided equally between my said children, subject, however, to this further provision; that if my son, Charles, should die before the sale of said block and before the division of the proceeds thereof leaving a child or children, then one-half of the said one-sixth which would go to him, if living, shall go to his child or children, who may survive him, and the other one-half of the said one-sixth which would have gone to him if living, shall go to his brothers and sisters in equal proportions. * * *

"Some time after the death of William L. Parthe, Sr., to-wit, December 14th, 1904, Minnie E. Parthe, his wife, died. Ten years after the death of William L. Parthe, Sr., Charles Parthe attempted to secure his share of the Parthe estate given him in Item 4 of the will of William L. Parthe, Sr., and to do this he began partition proceedings which were started some time after one of the plaintiffs in this case, Anna Parthe, had secured her divorce from Charles Parthe. As a result of Charles Parthe's demands and the institution of the partition proceedings, Robert I. Parthe and Edward J. Parthe purchased this interest for the sum of \$5,000 for his share of the estate and his interest in that block, and at that time Charles Parthe, the husband of Anna Parthe and the father of John Leroy Parthe, the plaintiffs herein, signed a contract to deliver to Robert I. Parthe and Edward J. Parthe a warranty deed

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for his interest in the Parthe estate and the property in question. A short time after this contract was made, a supplemental contract was made which changed the time of payment and provided for a payment of so much per week. Shortly thereafter Charles Parthe died, and his divorced wife, Anna Parthe, the plaintiff, was appointed administratrix of his estate, and collected from Robert I. Parthe and Edward J. Parthe the balance due under Charles Parthe's contract, amounting to approximately \$3,850. Anna Parthe and John Leroy Parthe then instituted the partition proceedings herein. The real estate described in the petition was not sold by the executors of the estate of William L. Parthe, Sr., and has not been sought to be sold by them. On December 9th, 1902, they filed their final account and were discharged as such executors, and no administrators with the will annexed have since been appointed."

The first question that presents itself for determination is, What interest in the real estate in question did Charles Parthe take under Item 4 of the will of his father, William L. Parthe, Sr.? This inquiry leads us to determine the proper construction to be placed upon Item 4 of said will.

The object and aim sought in the construction of the language and terms used in a will, and its sole and only purpose, is to ascertain the intent of the testator. It is the intention of the maker of a will, as indicated by the words, language, expressions and terms employed therein, that must be found by a court in its judicial interpretation, and this should be obtained by giving to the expressions employed their plain, ordinary and

generally accepted use and meaning. The plain and unambiguous words of the will must prevail, and they can not be controlled or qualified by any imaginary or seemingly unwarranted construction placed upon them, which might appear to grow out of the peculiar surroundings of the testator at the time of the execution of his will.

We find the language of the will under consideration clear, plain, explicit, and in no way ambiguous, so far as ascertaining the rights and interest of Charles Parthe in and to the real estate now in controversy. That part of the will necessary to be interpreted, and from which we must determine the extent of the estate devised to Charles Parthe, and the interest, if any, he had at the time of his death, is as follows:

"At the expiration of the said ten years from the date of my death, if my said wife is then deceased, or at the time of her death should she survive me more than ten years, the said block on lot No. 518 shall be sold by my executors, and the proceeds thereof divided equally between my said children, subject, however, to this further provision; that if my son, Charles, should die before the sale of said block and before the division of the proceeds thereof leaving a child or children, then one-half of the said one-sixth which would go to him if living shall go to his child or children who may survive him, and the other one-half of the said one-sixth which would have gone to him if living, shall go to his brothers and sisters in equal proportions."

If we apply the rule of law as to the construction and interpretation of wills as herein laid down

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to the above language, taken in connection with the conceded fact that Charles Parthe departed this life before the sale of the Parthe Block and before the division of the proceeds therefrom, we can not see how counsel for defendants in error are entitled to maintain their defenses as to the claim of the plaintiff in error John Leroy Parthe.

Under the provisions of the will, as contained in Item 4, Charles Parthe had certain rights in the real estate as to the income therefrom until it was sold and the proceeds from said sale distributed; but if he were not living at the time of such sale and distribution of the proceeds, then and in that event the one-half of his interest should go to and vest in his child or children, and the other half in his brothers and sisters.

We are bound to hold and do hold under the facts and law in this case that upon the death of Charles Parthe one-half of all of the interest in and to the real estate in question went to and vested in John Leroy Parthe, the surviving son of Charles Parthe, deceased, and the other one-half to the brothers and sisters of said Charles Parthe, as clearly provided for in the will of William L. Parthe, Sr.

It will be noticed that the interest in the real estate now vested in John Leroy Parthe came to him not from his father, Charles Parthe, but under and by the terms of the will of his grandfather, William L. Parthe, Sr.

Coming now to the second question presented for our consideration: Is Anna Parthe entitled to dower in any part of said real estate? This must be determined from the agreed facts and the pro-

visions of Section 8606, General Code, which reads as follows:

"A widow or widower who has not relinquished [relinquished] or been barred of it, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage, in one-third of all the real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, and in one-third of all the title or interest that the deceased consort had, at decease, in any real property held by article, bond, or other evidence of claim."

It must be conceded that whatever dower right, if any, Anna Parthe has in this real estate, comes to her by operation of law, and not otherwise.

What interest did Charles Parthe have in said real estate at the time of his death? None. Anna Parthe received no interest in it under the will of William L. Parthe, Sr., who by his will devised the share of Charles Parthe to him subject only to the happening of a certain event, namely, that he be living at the time of the sale and distribution of the proceeds; and, having departed this life before such occurred, then by operation of the will of said testator the interest that would have gone to Charles Parthe, had he been living at the time of the sale and distribution of the proceeds thereof, went to and vested in John Leroy Parthe and the brothers and sisters of Charles Parthe. Thus it must and does necessarily follow that Anna Parthe, the surviving spouse of Charles Parthe, is not entitled to dower in the real estate

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which was devised to John Leroy Parthe and to the brothers and sisters of Charles Parthe.

In the face of the conceded facts, the provisions of Section 8606, General Code, and our holding as to the devise in question under the will before us for consideration, we must hold that the claims made by Anna Parthe as to her dower rights are not well taken.

Are the defenses or either of them, as stated in the amended answer of the defendants below, who are also the defendants in error here, a bar to the rights of the plaintiff John Leroy Parthe to the relief prayed for in his petition? We must answer this in the negative.

The contract relied upon by the parties no doubt was entered into in good faith between the parties thereto, and would have been binding upon them had Charles Parthe been in full life at the time of the sale of the Parthe Block and the distribution of the proceeds of such sale. This contract was not signed by John Leroy Parthe, and therefore he can not be barred from his legal right to hold real estate devised to him under the will of his grandfather, William L. Parthe, Sr.

In passing let us say, in view of the facts contained in the agreed statement of facts, and from all the surrounding circumstances of this case, it is apparent to us that a seeming hardship will be cast upon some of the defendants in error; yet we know of no rule of law or equity that can change that well-known maxim, "An owner of real estate can only convey to the grantee to the extent of his own title and interest therein."

Viewing this case as we do, we are of the opinion that the judgment below should be reversed as to the plaintiff in error John Leroy Parthe, and affirmed as to the plaintiff in error Anna Parthe.

The court coming now to render the judgment that the common pleas court should have rendered in this case, it is hereby ordered, adjudged and decreed that John Leroy Parthe, plaintiff in error, one of the plaintiffs below, is entitled to have partition of the real estate described in the petition, and an accounting for rents and profits as prayed for; and that the petition be dismissed as to the other plaintiff therein, Anna Parthe.

The amended answer of Edward J. Parthe and Robert I. Parthe, who filed same for themselves and others, is hereby dismissed.

This cause is remanded to the common pleas court with instructions to carry into execution the judgment of this court.

Judgment accordingly.

POWELL and SHIELDS, JJ., concur.

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Payne v. Rech, Gdn.

PAYNE v. RECH, GDN.

Guardian of minor—Right of action against in representative capacity.

Where the guardian of a minor contracts with a third person for services to be rendered in behalf of such ward or his estate, and such services are rendered, such third person cannot maintain an action at law to recover for such services against the guardian in his representative capacity.

(Decided March 14, 1917.)

ERROR: Court of Appeals for Mahoning county.

Mr. Fred J. Heim and Mr. H. C. Simpson, for plaintiff in error.

Mr. J. H. C. Lyon and Mr. S. B. Mitchell, for defendant in error.

FARR, J. Thomas Payne, the plaintiff in error, brought an action in the municipal court of the city of Youngstown to recover from the defendant in error, Frank Rech, as guardian of his minor son, Leo Rech, for services claimed to have been rendered by said Payne, by agreement with said guardian, in connection with a suit for damages brought by the next friend of said minor for some personal injury claimed to have been sustained by said minor in an accident on one of the numerous railroads of said city of Youngstown. The petition in the court below alleges that Payne, by agreement with said guardian, assisted in the prosecution of said claim for damages in the way of making investigations, securing witnesses and

otherwise aiding in the successful conclusion of the litigation.

This cause was duly heard in the municipal court, and from its judgment an appeal was taken to the court of common pleas of Mahoning county, where a trial to a jury resulted in a verdict for plaintiff. A motion for a new trial was then made and sustained; application made and leave given to withdraw the answer, which was a general denial; and a demurrer filed to the petition, which was later sustained.

The plaintiff not desiring to plead further judgment was entered on the demurrer, and error is now prosecuted to this court, the parties here sustaining the same relation to each other as in the municipal court and the court of common pleas.

It will be observed that the issue raised here is whether a third person, contracting with a guardian of a minor, whereby services are rendered by such third person in behalf of the estate of such ward, can maintain an action against such guardian in his trust capacity, or whether suit can be maintained only against the guardian personally.

Judge Rockel, in his *Ohio Probate Practice*, Vol. 2, Sec. 1402, under the head of "Employment of attorneys, agents, etc.," observes in part, as follows:

"The guardian likewise has a right to employ agents wherever necessary, but allowance for these matters, rests largely if not entirely in the discretion of the Probate Court."

Judge Woerner, in his *American Law of Guardianship*, at page 185, pertinently observes as follows: "As a general proposition, guardians can

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not by their contracts bind either the person or estate of their wards. Such contracts bind the guardians personally, and recovery thereon must be had in an action against them, not against the ward." Citing *Rollins v. Marsh*, 128 Mass., 116, 118; *Adams v. Jones*, 8 Mo. App., 602; *Dalton v. Jones*, 51 Miss., 585, and *Elson v. Spraker*, 100 Ind., 374. And to the same effect the same author states the rule at pages 164, 272, 281 and 470. At page 192 he observes: "Actions on such contracts must be brought against the guardians personally, not against their wards." Citing *Forster v. Fuller*, 6 Mass., 58; *Stevenson v. Bruce*, 10 Ind., 397; *Tobin v. Addison*, 2 Strobb. L., 3, and *Hunt v. Maldonado*, 89 Cal., 636. Likewise it is stated in 21 Cyc., at page 193: "*Actions by Third Persons Against Guardian or Ward — Actions Against Guardian*. According to the weight of authority a suit against a guardian on a contract touching his ward's estate is personal against him, and he cannot be sued on such contract in his representative capacity so as to make the estate of the ward liable to be taken on execution." And again, at page 115, it is likewise stated that a guardian cannot by his contract bind either the person or estate of his ward, even for the benefit of the ward, whether for support and maintenance or in the management of his estate, and that the guardian is personally and solely liable. And the text is supported by a large number of cases from more than a score of states. The foregoing text is supported by 15 Am. & Eng. Ency. Law (2 ed.), page 77. The Indiana law relating to guardianships is very similar to that of Ohio, and the above-cited

case of *Elson v. Spraker*, 100 Ind., 374, is in full accord with the foregoing and cites the earlier cases of *Lewis v. Edwards*, 44 Ind., 333; *Stevenson v. Bruce*, 10 Ind., 397, and *Clark v. Casler*, 1 Ind., 244. To Massachusetts does Ohio owe her greatest debt for probate law and procedure, and the above-mentioned case of *Rollins v. Marsh*, 128 Mass., 116, is well in point in principle with the case at bar. There it is held: "A contract by a guardian for the support and care of his ward binds the guardian personally, and not the ward."

The foregoing is supported in principle by 1 Elliott on Contracts, Sections 522 to 526, inclusive. The case of *Hurd et al. v. W. & L. E. Ry. Co.*, 4 N. P., 404, is in point with the case at bar. In that case it was held that an action could not be maintained for attorney fees against the administrator of an estate, or the guardian of minor wards, heirs at law of such estate, for legal services rendered in behalf of such estate. The above doctrine was affirmed in *Connell v. Brumback et al.*, 18 C. C., 502, the first proposition of the syllabus of which is as follows: "There is no cause of action that can be maintained against either of these representative parties, either the administratrix or the guardian, in their representative capacities." It is well settled in this jurisdiction that a suit cannot be maintained against an executor or an administrator for services rendered by an attorney in behalf of such estate. *Thomas, Admx., v. Moore, etc.*, 52 Ohio St., 200, 201, 205; 1 Rockel's Ohio Probate Practice, Section 507; *McBride & McBride v. Brucker, Admr.*, 5 C. C., 12, 3 C. D., 7; *Mellen v. West, Admr., etc.*, 5 C. C., 89, 3 C. D., 46;

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West, Admr., v. Dean, 15 C. C., 261, 8 C. D., 797; *Lucht, Admr., v. Behrens*, 28 Ohio St., 231, and *In re McAlpin*, 8 Dec., 654, 656.

It is urged in argument, however, that such action may be maintained under favor of paragraph 5 of Section 10933, General Code, which reads as follows:

"To pay all just debts due from such ward out of the estate in his hands, and collect all debts due to the ward; in case of doubtful debts, to compound them to appear for and defend, or cause to be defended, all suits against his ward."

How less could a guardian's duties be defined and still permit him to serve in a trust capacity for a minor, so frequently incapable of representing or understanding his own interests? The very nature of the relation between guardian and ward suggests the impropriety of permitting the guardian by contract to bind the ward's estate in such manner as to render it liable to execution. The above section is not susceptible of such interpretation as to permit the maintenance of a suit against a guardian in his representative capacity.

The cases of *Kingsbury v. Powers*, 131 Ill., 182, 22 N. E. Rep., 479; *Taylor v. Bemiss*, 110 U. S., 42; *In re Hynes*, 105 N. Y., 560, 12 N. E. Rep., 60; *Fillmore v. Wells*, 10 Colo., 228, 15 Pac. Rep., 343; *Smith v. Bean*, 8 N. H., 15, and *Mathes v. Bennett, Gdn.*, 21 N. H., 204, are cited by plaintiff in error as sustaining his right to recover from the guardian in his representative capacity, but a careful examination of said cases discloses that they pass only upon the right of a guardian to employ counsel or incur other expense in the interest of a ward's

estate, that such services are a proper credit against such estate, and, in one instance, at least, that a court of equity would so decree. Said cases are correct in principle, but not in point with the case at bar. The reason for the rule that an action at law cannot be maintained against a guardian as such is obvious — there can be no contractual relation between a minor and another person; he cannot bind his estate, nor can it be directly obligated except through the medium of the probate court, created for the express purpose of safeguarding all such interests. To hold otherwise would be to destroy in part, at least, the rather delicate fabric of probate jurisprudence. Persons contracting with guardians, if not aware of the representative capacity, have the right of action against such guardian personally, and are no worse off when the truth is discovered. If fully advised, they must assume the risk which they voluntarily incur. The law of Ohio does not provide for the filing of a claim against the estate of a ward, but it was held in the case of *Turner v. Flagg*, 6 Ind. App., 563, 33 N. E. Rep., 1104, that where a person has a legal and equitable claim against the estate of an infant ward he may present his claim against the guardian in the probate court and secure an order for the payment of such amount as the court may deem proper. It was likewise so held in *Appeal of Price*, 116 Pa. St., 410, 9 Atl. Rep., 856. It is certain, however, that he may maintain an action against the guardian personally, or act through the medium of the guardian's account in the probate court.

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There is no error in the holding of the court below, and it is therefore affirmed.

Judgment affirmed.

POLLOCK and METCALFE, JJ., concur.

THE CITY OF MIDDLETOWN v. DOTY.

City streets—Grading and construction of sidewalks—Change of grade by city—City not liable for damages, when.

In an action against a municipality for damages for change of grade in a street, the plaintiff must show either that his buildings were constructed in accordance with a grade regularly established, either by ordinance or user, and that the improvement of the street had been made to a different grade and damages caused thereby; or that while no grade was then established, the buildings were originally erected to conform to what would be a reasonable grade for the unimproved street when it should be improved, and that instead of establishing such reasonable grade the city authorities had adopted one entirely unreasonable.

(Decided January 13, 1917.)

ERROR: Court of Appeals for Butler county.

Mr. W. G. Palmer, for plaintiff in error.

Messrs. Andrews & Andrews, for defendant in error.

JONES, OLIVER B., J. This proceeding in error is brought to reverse the judgment of the court of common pleas in favor of Charles G. Doty, plaintiff below and defendant in error here, for

damages to his property caused by the grading and construction of sidewalks on Bellemonte avenue in front of same.

The amended petition alleged that prior to the improvements put upon said lot Bellemonte avenue had an established grade, which was a reasonable grade and afforded reasonable access to said lots, and that after the grade was established and so existed the streets were improved with reference to the grade then existing; that the city has changed the grade of this street so that the grade in front of plaintiff's property has been lowered about 8 feet; that plaintiff's dwelling is about 14 feet from the sidewalk line of the street, and that in cutting down the street the ingress and egress of plaintiff's property is greatly interfered with, making it necessary for plaintiff to construct steps and retaining walls, or to grade and rearrange said property.

The city as defendant denied that, prior to the improvements upon the lots of plaintiff, Bellemonte avenue had an established grade or that the lots were improved with reference to that grade, and averred that the buildings and improvements of plaintiff were made before any grade whatever had been established by the city of Middletown, and were made without reference to a reasonable grade for Bellemonte avenue, and that by the use of ordinary care plaintiff or his grantor could have anticipated the grade which has since been established. The city further averred that the established grade of Bellemonte avenue is a reasonable and proper one, and neces-

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sary for its proper use as a public street of said city.

These averments were denied by plaintiff in his reply.

The evidence shows that Bellemonte avenue is a street but two squares long, extending from Third street to North street; that the dwelling house on plaintiff's lot was built and other improvements made in the year 1908, the house being opposite the end of Second street, which terminated at Bellemonte avenue; that at that time Bellemonte avenue was simply a platted and dedicated street upon land which had not been graded but was at the time fenced and temporarily used as a pasture; and that no grade had been fixed by user because no public travel passed over same.

By ordinance passed in 1910 the city established the first grade for Bellemonte avenue, and, subsequently, in 1915, two ordinances were passed by the city authorities establishing a grade for the east curb and for the west curb, respectively. Both of the grades established by these ordinances provided for a descending grade from the level of Third street, at its intersection with Bellemonte avenue, to the level of North street, at its intersection. There was in front of plaintiff's property a change, by the second ordinance, of less than six inches; and no improvements were made to conform to said first grade of 1910, nor were any improvements made between the passage of the first grade-ordinance and the second grade-ordinance.

The evidence of Charles Goldman, plaintiff's grantor, who built the house, shows that he made no application to the city for the establishment

of a grade for Bellemonte avenue at the time of building, and that he located the house at the particular place at which it was built because he regarded it as a beautiful site for a home, having the outlook at the head of Second street. There is nothing in the record to show that there was any effort to anticipate the reasonable grade at which Bellemonte avenue would be improved, nor does the record contain any evidence showing that the grade established by the city, upon which improvements have been made, is in any way unreasonable. The record also fails to show that any claim for damages was filed by plaintiff under the provisions of either Section 3823 or Section 3830 of the General Code.

As is well known, the law of Ohio, in compensating property owners for damages to improvements caused by change of grade, or by the establishment of an unreasonable grade in the construction of streets, is different from that of most of the states of the Union, in that it is deemed inequitable to permit the whole burden to fall upon the owner of property, which has been improved with reference to an established grade, rather than to have it borne by the public which is benefited by the new grade. The rule in Ohio is well stated in the syllabus in *The City of Akron v. The Chamberlain Co.*, 34 Ohio St., 328, as follows:

"The owner of a lot abutting on an unimproved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities,

if made within the reasonable exercise of their power.

"The liability of a municipality for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulting from a change of such grade, or, where the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade.

"Whether a grade be unreasonable or not, must be determined by the circumstances existing at the time the grade was established, and not by the circumstances existing at the time abutting lots may have been improved."

If plaintiff had been able to show that his buildings were constructed in accordance with a grade regularly established, either by ordinance or by user, and that the improvement of the street had been made to a different grade, and damages caused thereby, he would be entitled to recover such damages; or if he had shown that while no grade was then established the buildings were originally erected to conform to what would be a reasonable grade for the unimproved street when it should be improved, and that instead of establishing such reasonable grade the city authorities had adopted one entirely unreasonable, then he might have recovered. As stated by Judge McIlvaine, in *The City of Akron v. The Chamberlain Co.*, *supra*, in the opinion of the court, at page 335:

"Whatever latitude there may be in the exercise of discretion in fixing the grade of a street is lodged in the municipal authorities, and not in the adjacent lot-owners."

In other words, the duty of establishing the grade rests primarily with the municipal authorities, and the city can only be held for an unreasonable grade when they have failed to perform that duty and made the grade so unreasonable as to amount to an abuse of discretion. Plaintiff failed to produce any witnesses to show such abuse of discretion in this case. The only evidence as to the reasonableness of the grade came from witnesses produced by the defendant, and there is nothing to show that the grade to which Bellemonte avenue is improved could be considered an unreasonable grade.

The verdict of the jury and the judgment of the court below is contrary to the evidence and to the law. The judgment is therefore reversed and the cause remanded for such further proceedings as are authorized by law.

Judgment reversed.

JONES, E. H., P. J., and GORMAN, J., concur.

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Baker v. State.

BAKER v. THE STATE OF OHIO.

Parent and child—Failure to support minor children—Indictment in one count—Charges failure as to two children—Validity of conviction as to one child—And acquittal as to other.

It is not error, under an indictment charging the defendant with failure to support his two minor children under sixteen years of age, to adjudge him guilty with respect to one of said children and not guilty with respect to the other, and to impose sentence in the one case, in default of bond conditioned upon his providing said neglected child with a proper home, food and clothing in the future, where no objection was made to the form of the indictment in the trial court.

(Decided March 24, 1917.)

ERROR: Court of Appeals for Licking county.

Messrs. Kibler & Kibler, for plaintiff in error.

Mr. Chas. L. Flory, prosecuting attorney, for defendant in error.

HOUCK, J. Error is here prosecuted, in which it is sought to reverse a judgment of the common pleas court rendered against plaintiff in error, Ralph Baker, who was convicted upon an indictment found by the grand jury of Licking county, in which he was charged with failing to support his two minor children. The indictment contained but one count, and no motion or demurrer was filed to the indictment by the accused. The defendant entered a plea of not guilty to the charge contained in the indictment, and in open court waived his right to a jury trial, and the cause was submitted to the trial judge, to be heard and determined upon the evidence and the law. Trial

was had, and the defendant was acquitted as to the charge made against him in the indictment of failing to provide for his minor son, John Baker, but he was found guilty, as charged in the indictment, of failing to provide for Russell Baker. The trial judge made a finding of facts and conclusions of law, which is as follows:

"This day came the parties and this cause came on for trial upon the indictment and the plea of not guilty made by the defendant herein, and by consent of the parties a jury was waived and this cause submitted to the court upon the indictment, plea, and the evidence. And the court being fully advised in the premises, on the request of the defendant that its conclusions of fact be stated separately from its conclusions of law, find, as its conclusion of fact that:

"From the first day of May, 1915, until the date of the finding of the indictment herein, the said defendant was the father of John Baker, of the age of fifteen years, Russell Baker, of the age of five years, both being under the age of sixteen years, and that said children were residents of Licking county, Ohio; that the defendant did not fail, neglect or refuse to provide the said John Baker with a necessary and proper home, care, food and clothing during the time named in said indictment, and that the said defendant was able, by reason of his personal labor and earnings to provide said John Baker with the necessary and proper home, care, food and clothing; that the said defendant did fail, neglect and refuse to provide Russell Baker named in said indictment with

the necessary and proper home, care, food and clothing during said period.

"And as its conclusions of law upon the facts found, the court find that the said defendant is not guilty as charged in said indictment of failing, neglecting and refusing to provide John Baker with necessary and proper food, home, care and clothing, and that the said defendant is guilty of failing, neglecting and refusing to provide the said Russell Baker with the necessary and proper home, care, food and clothing during said time as charged in said indictment. To which finding of the court, as to the said Russell Baker, the defendant excepts.

"It is therefore adjudged by the court that the said defendant is not guilty as charged in said indictment of failing, neglecting and refusing to provide the said John Baker with necessary and proper home, care, food and clothing as charged in said indictment.

"And it is further adjudged by the court that the said defendant is guilty of failing, neglecting and refusing to provide the said Russell Baker with the necessary and proper home, care, food and clothing as charged in said indictment. To which judgment of the court, finding the said defendant guilty as to said Russell Baker, the defendant excepts.

"It is therefore ordered and adjudged by the court that unless the said defendant forthwith appear before this court and enter into a bond to the state of Ohio in the sum of five hundred (\$500) dollars, with sureties approved by this court, con-

ditioned that the defendant will furnish the said Russell Baker with necessary and proper home, care, food and clothing, it is ordered and adjudged by the court that the said defendant be imprisoned in the jail of said county at hard labor for not less than six months and to pay the costs of prosecution. To which judgment of the court said defendant excepts.

"Thereupon came the defendant and filed a motion to set aside judgment, finding and decree of the court, and grant a new trial herein for the reasons stated in said motion, which motion is overruled by the court. To which the defendant excepts, and on motion of the defendant the usual statutory time is allowed for preparing and having allowed a bill of his exceptions herein.

"And on motion of the defendant, it is ordered that execution of above sentence be suspended until the first day of January, 1917, to enable the said defendant to file a petition in error herein."

It is contended by counsel for the plaintiff in error that the trial judge was without authority to find the defendant guilty of failing to support one of his minor children, and not guilty of failing to support the other; for the reason that there is but one count in the indictment and that therefore he must be found guilty as to both children, or found not guilty — that there can be no separation in the finding as to the innocence or guilt of the accused with reference to the two children. In other words, it is urged that there was but one course open to the trial judge under the form of this indictment — either find the defendant

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guilty of failing to support both of his minor children, or acquit him of the charge made against him of failing to support both.

We do not think the claim of learned counsel in this respect sound. While we feel that it would have been in better form to have made two counts in the indictment, yet, when the accused did not take advantage of this by motion or demurrer, and went to trial upon the indictment as returned, we do not think that he was in any way prejudiced when he was found guilty of failing to support one of the children and discharged as to the other. We do not see how it could seriously be contended that if the case had been submitted to a jury under proper instructions from a trial judge, the trial judge would of necessity, under the law, have instructed the jury that if they found from the evidence that the defendant had failed to support both of his children, then they should return a verdict in accordance with such finding; but if they found, under the evidence, that he was guilty of failing to support one, and not the other, then they should so find in their verdict. This case was submitted to the trial judge without the intervention of a jury, and, by so doing, the court was clothed with power and authority to determine the facts and apply the law applicable to the state of facts as found by him, and in the instant case we are unable to find wherein the plaintiff in error has been in any way prejudiced by the finding of facts and the application of the law thereto, as contained in the conclusions of law found by the court.

Finding no prejudicial error in the record, the judgment of the common pleas court is affirmed.

Judgment affirmed.

SHIELDS and POWELL, JJ., concur.

THE CLEVELAND WIRE SPRING CO. v. GENERAL
ACCIDENT, FIRE & LIFE ASSURANCE
CORPORATION, LTD.

Indemnity insurance — Negotiations for settlement with employe of insured — Good faith by insurer — Action for difference between verdict and proposed settlement — Facts pleaded insufficient to show bad faith.

1. An indemnity insurance company issuing policies to indemnify the assured in a fixed maximum sum against loss by reason of liability which may be imposed by law on the assured if any of its employes accidentally suffer injuries within the provisions of the policy, owes to the assured the duty of exercising good faith under its contract of indemnity and in negotiations for the settlement of legal proceedings brought by injured employes.
2. Where a policy for \$5,000 contains a provision that no action shall lie against the indemnity company for any loss under the policy unless brought by the assured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue, and the petition in an action by the assured against the indemnity company avers that the assured had been sued for a sum much greater than the face of the policy by an employe injured in its service; and the petition further avers that while the action was pending the assured and the indemnity company made every effort to settle with the injured employe and his attorney for a reasonable amount, but that \$7,500 was the best proposition that could be obtained; that the assured offered to pay \$2,500 of this amount but the indemnity company refused to pay more than \$3,500, although stating that the conditions were such that in all probability a

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verdict of \$10,000 or more would be rendered against the assured, which facts the petition alleged constituted bad faith; and that the case was not settled but proceeded to trial and resulted in a verdict and judgment in favor of the employe for \$20,000 which was paid by the assured, the averments of fact do not show bad faith on the part of the indemnity company nor state facts which render it liable for the difference between the amount paid in satisfaction of the judgment and the amount for which the action could have been settled.

(Decided April 21, 1917.)

ERROR: Court of Appeals for Cuyahoga county.

Mr. T. J. Ross and Messrs. Holding, Masten, Duncan & Leckie, for plaintiff in error.

Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews and Mr. C. M. Horn, for defendant in error.

RICHARDS, J. The defendant issued to the plaintiff a policy to indemnify it to the extent of \$5,000 against loss by reason of liability which might be imposed by law upon plaintiff if any of its employes should accidentally suffer bodily injuries while employed in plaintiff's factory, and within the provisions of the policy. During the term of the policy one of plaintiff's employes, named Joe Fogach, was injured, which injuries were accidentally suffered and were alleged to have been suffered through the negligence of the plaintiff herein while Fogach was such employe in plaintiff's factory. The policy of indemnity provided as follows:

"G. Except as herein elsewhere provided for, the assured shall not voluntarily assume any

liability, settle any claim, or incur any expense except at his own costs, or interfere in any negotiation for settlement or legal proceeding without the consent of the corporation previously given in writing.

"I. No action shall lie against the corporation to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue."

An action was brought by Fogach against his employers to recover for the injury suffered by him, and while it was pending negotiations for settlement occurred. The case was not settled, but proceeded to trial, and resulted in a verdict and judgment in favor of Fogach in the sum of \$20,000, which amount was paid by The Cleveland Wire Spring Company, plaintiff in this case.

The petition in the present action contains three causes of action, the first cause being based on the policy, to recover the amount thereof, to-wit, \$5,000. The second cause of action is based upon a clause in the policy rendering the indemnity company liable for immediate and imperative medical and surgical relief, and is for \$49.75. These two causes of action have been adjudicated in favor of the plaintiff in this case and are not involved in the controversy now pending between the parties.

The third cause of action was met by a demurrer, filed by the defendant, which demurrer was sustained, and final judgment on that cause of action rendered against the plaintiff.

It is averred, in substance, in the third cause of action, that after the original action to recover damages for personal injury was brought against this plaintiff, the indemnity company undertook to and did defend the same in the name of this plaintiff, and advised plaintiff that it had made every effort to settle with Joe Fogach for a reasonable amount but was unsuccessful; that the least amount that it was able to settle for was far in excess of the amount of the policy limit; and that if the case proceeded to trial there was a strong probability of a verdict being rendered in excess of the amount of \$5,000, and it therefore advised plaintiff to consult its own private counsel as to the best manner of handling the case.

The petition further averred that this plaintiff did employ counsel, and negotiated with said Joe Fogach and his attorneys for the purpose of settling the claim, and as a result of such negotiations obtained a proposition of settlement in the sum of \$7,500; that it communicated the offer of settlement to the indemnity company and agreed to pay, in order to effect the settlement, an amount equal to the difference between \$7,500 and the amount of the maximum liability of \$5,000 stipulated in the policy to be paid by the indemnity company.

The petition further averred that the indemnity company thereupon stated to plaintiff that it would not pay in settlement any sum of money in excess of \$3,500, and that if settlement was to be made this plaintiff must pay the difference between said amount of \$3,500 and the amount of the proposed settlement, \$7,500. The plaintiff averred that the

indemnity company represented to it that there was urgent necessity of settling the case as the conditions were such that a verdict of \$10,000 or more would in all probability be rendered against it in the suit brought by Joe Fogach; and the plaintiff claimed that these facts constitute a breach of good faith on the part of the indemnity company in the performance of its contract. Plaintiff prayed for judgment on this third cause of action in the sum of \$12,500, being the difference between the amount paid by it in satisfaction of the judgment and the amount for which the case could have been settled.

The theory of the plaintiff in this action is that the indemnity company impliedly agreed to exercise good faith in its conduct under the contract of indemnity, and that having, as plaintiff claims, failed so to do, it is liable in tort for the damages proximately resulting therefrom. We are quite in accord with the plaintiff's contention that the duty rested upon the indemnity company to exercise good faith under the contract relations existing between the parties, and it will become necessary to recur to the averments of the third cause of action to ascertain whether they do set forth such facts as may amount to a charge of bad faith.

The contract of indemnity rendered the company liable only for loss actually suffered and paid by the assured in satisfaction of a judgment after trial of the issue. It, of course, can not be contended that liability arose, by virtue of the provisions of the policy, in excess of the maximum amount of \$5,000 specified therein, and for im-

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mediate imperative medical and surgical relief; and no liability for any amount arose under the contract of indemnity until after judgment had been rendered against the assured and the same had been satisfied by it. The pleading avers that the indemnity company stated that there was a "strong probability of a verdict being rendered in excess of the policy limits," and that "a verdict of ten thousand dollars or more would in all probability be rendered against this plaintiff as defendant in the suit of Joe Fogach." It will be noticed that the averments do not show that the indemnity company was admitting its liability to pay the full amount of its policy by reason of the injury to Fogach, but only that there was a strong probability of a large verdict and that a verdict of \$10,000 or more would in all probability be rendered. The pleading nowhere shows the extent of the injuries to Fogach, nor the manner in which they were received. It is a fair inference from the averments that the prosecution of the case was attended with the uncertainty usually met with in actions by employees to recover for personal injury, the strong probabilities being, in this case, as averred in the petition, in favor of the recovery of a large sum.

The indemnity company, however, had the right to estimate and value that probability. It might well take the position, that, while the verdict would probably be in excess of the amount of its policy, it might not be so; and it had the right, under the terms of the policy, to require that the action should be litigated in order to definitely settle and determine the amount of the liability, if any. Evi-

dently, under the averments of the third cause of action, it valued this right at \$1,500, and, in so valuing it, and in declining to pay an amount in excess of \$3,500 by way of settlement, the petition contains no averments of fact showing bad faith. Looking at the result finally reached it would have exercised better judgment by offering to pay a larger sum than \$3,500, but this is far from saying that in what it did do it was in any wise guilty of bad faith. It is perfectly clear, under the language of the policy, that the indemnity company might have stood on its contractual rights and declined to offer the payment of any sum by way of settlement in advance of the trial.

The precise question under consideration does not appear to have been determined in very many reported cases, but the principles determining liability in such cases have been announced in some very respectable authorities.

Schmidt v. Travelers Insurance Co., 244 Pa. St., 286, was a case in which under an indemnity policy of \$5,000 settlement could have been effected for \$6,000, the assured offering to contribute \$1,000 to the amount and requesting the indemnity company to make settlement, which was refused. The trial resulted in a verdict and judgment for \$9,200. It is true that the report of this case does not show that bad faith was specifically charged against the indemnity company, as is claimed to be charged in the petition in the instant case; but the petition in the case cited did set forth the facts already stated, and the only difference of importance between that case and the case now under consideration is that in this case the defendant

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company admitted there was strong probability that a verdict would be rendered for a sum largely in excess of the face of the policy. In the opinion of this court the averments in this regard do not distinguish the case from the authority just cited.

Brown & McCabe, Stevedores, Inc., v. London Guarantee & Accident Co., 232 Fed. Rep., 298, is another case shedding much light on the question under consideration. In that case the report shows that the indemnity company *recognized its liability*, and this fact distinguishes it from one in which the averment is only that there is strong probability of a verdict being rendered in excess of the amount of the policy. The court, in the case last cited, uses this language in the course of the opinion:

"It has been held that, under a policy like the one in question, the insurance company has a right to settle with an injured employe or not, as it deems advisable, and if it neglects or refuses to do so, and litigates the matter in good faith, and judgment is recovered for more than the face of the policy, it is not liable for the excess."

While announcing the rule as above stated, it held that the case was not within its terms, because it appeared to be an attempted hold-up of the assured. The averments in the case at bar do not show that the indemnity company undertook to hold up the assured, nor that it exercised bad faith, but rather that the parties were all negotiating in an attempt to make such a settlement as would be advantageous to all parties concerned.

An authority on which much reliance is placed by the plaintiff is *Wisconsin Zinc Co. v. Fidelity & Deposit Company of Maryland*, 162 Wis., 39, 155 N. W. Rep., 1081. In that case the court held that no duty to exercise ordinary care was enjoined upon the indemnity company by the terms of the policy, and determined that the first and second causes of action were insufficient. The third cause of action was held to set forth a good cause of action because the court, as it construed the averments thereof, reached the conclusion that it did in fact charge the indemnity company with failing to exercise good faith. We are entirely in accord with the holding in that case. The indemnity company had the right, as was there said, to consult what it deemed to be its own interest in making settlement, but it did not have the right to abuse the power vested in it and recklessly and contumaciously refuse to settle. It can not be said that the averments in the third cause of action in the case at bar show reckless or contumacious conduct on the part of the indemnity company. It went no farther than to concede strong probability of a large verdict, perhaps bearing in mind that judgments are not always rendered on verdicts which are returned, and, if rendered, are sometimes for smaller amounts than named in the verdicts, and perhaps relying also on the possibility of obtaining a reversal of any judgment that might be rendered. The indemnity company in determining how much it would pay by way of settlement had the right to take into consideration all the possibilities that were or might be presented to relieve it from ultimate liability under the terms of its

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policy, including the possible insolvency of the assured. It is evident from the fact that it offered 70 per cent. of the face of the policy by way of settlement that it must have realized a strong probability of recovery in a large sum. However, in view of the fact that its maximum liability under the policy was \$5,000, it falls very far short of being an admission on its part of a liability for the amount of \$5,000 for it to suggest the probability of a recovery of an amount that would constitute such a liability; much less does it tend to show any bad faith on its part.

We find nothing in the case of *Brassil v. Maryland Casualty Co.*, 210 N. Y., 235, inconsistent with the views expressed in this opinion.

The judgment will be affirmed.

Judgment affirmed.

CHITTENDEN and KINKADE, JJ., concur.

Judges of the Sixth Appellate District, sitting in place of Judges GRANT, CARPENTER and LIEGHLEY, of the Eighth Appellate District.

HASERODT, CLERK OF COURTS, ET AL. v. THE STATE,
EX REL. WILCOX, CITY SOLICITOR, ETC.

Office and officer—Fees—Chief of police—Services in state cases in police court.

Sections 3016 and 4581, General Code, do not fix definitely the amount of compensation that may be allowed a chief of police for services in state criminal cases rendered in police court, and no fees may be allowed said officer for such services under favor of these sections.

(Decided May 8, 1917.)

ERROR: Court of Appeals for Cuyahoga county.

Mr. Cyrus Locher, prosecuting attorney, and *Mr. F. W. Green*, assistant prosecuting attorney, for plaintiffs in error, county clerk, auditor and treasurer.

Messrs. Mathews, Orgill & Maschke, for Frederick Kohler, defendant in error.

MIDDLETON, J. This case involves the disposition of certain costs taxed in the name of Frederick Kohler, as chief of police of the city of Cleveland, in state criminal cases originating in the police court and municipal court of that city, in which convictions were had, and costs allowed by the state and paid into the county treasury of Cuyahoga county to the credit of said chief of police.

The original action was instituted in behalf of the city of Cleveland by E. K. Wilcox, as city solicitor, who asked for a mandatory order against the clerk of the courts of Cuyahoga county, and

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the auditor and treasurer thereof, directing the payment of said costs to the city of Cleveland. The chief of police, Frederick Kohler, by cross-petition, claimed said costs, because they were taxed as his fees in the various cases involved; and the trustees of the police relief fund, by cross-petition, claimed them upon the ground that the chief of police did not personally perform the services for which the fees were taxed and allowed, but said services were performed by subordinate members of the police force of said city, and such members, by a written agreement, had assigned and transferred their interest therein to the police relief fund, which is administered by said trustees.

In the court of common pleas demurrers were sustained to all the pleadings filed in the original action except the petition of the relator, and judgment was rendered for the city upon this petition, and a mandatory order allowed directing the payment of all of said costs to the city. This judgment appears to have been based upon the provisions of Section 4213, General Code, which reads:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

In view of the decision in the cases of *Portsmouth v. Milstead* and *Portsmouth v. Baucus*, reported in 8 C. C., N. S., 114, and subsequently affirmed by the supreme court, without opinion, in 76 Ohio St., 597, the action of the trial court

clearly was erroneous. These cases settle conclusively the proposition that the only fees to which the provisions of said Section 4213 apply are fees earned under municipal ordinances and regulations, and that the provisions of this section do not apply to the fees of municipal officers earned in state criminal cases. We are constrained to hold, therefore, that the learned trial court erred in rendering judgment for the city of Cleveland, and that said city is without any legal right to the fees in question. We do not, however, hold that the trial court erred in sustaining demurrers to the cross-petitions of the chief of police and the trustees of the police relief fund.

It is contended by the defendant county officials that there is no statutory authority for taxing fees to a chief of police for services in a police court or in a municipal court, and that therefore none of the present claimants to these costs has any legal right thereto.

The chief of police, Frederick Kohler, contends that he is entitled to said costs under the provisions of Sections 3016 and 4581, General Code, and relies upon these sections as authority for fixing and allowing fees to a chief of police for services in a police court. The contention of the chief of police in this respect appears to be supported by at least some slight judicial sanction. In the case of *City of Delaware v. Mathews*, 13 C. C., N. S., 539, affirmed without opinion in 82 Ohio St., 423, the court had under consideration the right of a chief of police to fees in a mayor's court, but was not called upon to determine and did not decide the right of such officer to fees for services in a police

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court. However, in this case, at page 540, the circuit court made this observation:

"The chief of police, in cities having a police court, were to receive like fees as constables and sheriffs in the probate court and before justices of the peace."

Apparently this observation was based upon the provisions of Section 4581, above mentioned, which says:

"Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

This observation by the court, under the circumstances, should not be considered more than a mere *obiter dictum*. However, it has been seized upon by those interested as a judicial interpretation of said section and has been claimed as authority for the allowance of fees to chiefs of police for services in a police court.

Keeping in mind the principle that the compensation of public officers must be fixed by statute, the construction thus claimed for this section will not stand analysis. Assuming that the fees named therein include fees which may be earned by a chief of police, by what rule are such fees to be determined under its provisions? First, it provides that fees in the police court in state cases shall be the same as are allowed in the probate court or before justices of the peace. Here are two distinct and separate provisions; one is that the fees shall be the same as are allowed in the

probate court, and the other is that the fees shall be the same as allowed before justices of the peace. Which provision, therefore, controls? The only officers who render services in the probate court and before justices of the peace similar to those performed by a chief of police in a police court are sheriffs and constables. Therefore, if the foregoing provisions of this section are to be given any operative force they must be held to provide that the fees of a chief of police shall be the same as those of a sheriff or a constable in the probate court or before justices of the peace. Now, the fees allowed in the probate court are fixed by the provisions of Section 11204, which provides that said fees shall be the same as those allowed in the court of common pleas "for like services." The fees of a sheriff, therefore, in the probate court are fixed by the provisions of Section 2845, and we presume that this section, also, would control his fees for any services rendered before a justice of the peace. But the fees of a constable before a justice of the peace are fixed by the provisions of Section 3347, General Code, and the fees under this section are different from the fees of a sheriff under Section 2845, aforesaid. Therefore, if we are to take Section 4581 as the statutory authority for fixing the fees of a chief of police for services in a police court, which of the two provisions of said section shall we consider as controlling? It seems that in the taxing of fees of a chief of police for such services it has been the practice, in some jurisdictions at least, to fix his fees under the section relating to constables, if this section

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provided a fee for the service to be taxed. This was done because the latter section provides a lower fee than that named in the section relating to sheriffs. But if the services rendered were those for which no fee was provided in the case of constables, then the fee as provided in the case of sheriffs was allowed. It is apparent, without further discussion, that such procedure is without any statutory authority.

In the case of *The State, ex rel. Ribble, Pros. Atty., v. Kleinhoffer*, 92 Ohio St., 163, the supreme court had before it for consideration the right of a humane officer to fees for services rendered by him in cases prosecuted before a justice of the peace, and the court had under consideration the provisions of Section 10076, General Code. In discussing the provisions of this section, on page 166 of the opinion, the court say:

"And again, if the pronoun 'they,' as used in Section 10076, could be held to refer to officers other than humane officers—for example, to a sheriff or constable—it would be impossible to determine to which it does refer. And it is important and necessary that this be known, for the fees of a sheriff and those of a constable as fixed by Sections 2845 and 3347, respectively, are different."

We think this language of the court is equivalent to a holding that if the section there under consideration could be construed as providing that humane officers should receive the same fees as a sheriff or constable for like services, it would be inoperative because of its indefiniteness. Now the

provisions of Section 4581, aforesaid, present precisely this situation, for the most that may be claimed for this section as authority for the fixing and allowance of fees to a chief of police is that it provides that such fees shall be the same as those of a sheriff or constable in the probate court or before a justice of the peace. We regard the reasoning of the court in the case last cited as conclusive against any claim that said Section 4581 is effective in furnishing statutory authority for the fixing of fees in state criminal cases in a police court to the chief of police for services rendered therein.

It is apparent that the provisions of Section 3016 do not furnish such authority, for its provisions are intended only to authorize the payment of such fees from the county treasury, and imply that under some other statute may be found the authority for fixing said fees. While it is not contended here that any authority may be found in the provisions of Section 4534 for the allowance of the fees in question, yet it is well to observe that this section is subject to the same infirmity, and nothing may be claimed for a chief of police under its favor because of the indefiniteness and uncertainty of its provisions in respect to the amount that may be allowed said officer in state cases.

It follows, therefore, that much as we might desire to sustain the legality of such allowance we must hold that the money now in the treasury of this county to the credit of the chief of police for fees earned in the police courts in the cases aforesaid is there without warrant of law and should be returned to the state treasury.

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It appears from the pleadings that the fees in controversy were taxed for services rendered by said chief of police between the 2d of May, 1903, and the 24th of February, 1913. It follows, therefore, that from the 1st of January, 1912, until the 24th of February, 1913, the fees so taxed were for services rendered in the municipal court of said city, and it therefore becomes necessary to consider whether the laws pertaining to that court furnish any authority for the taxing of such fees.

The law under which said services were rendered in the municipal court is found in 102 Ohio Laws, 166, in the provisions of an act passed May 10, 1911. Section 36 of that act provides as follows:

"In criminal cases all fees and costs shall be the same as now fixed in the police court of said city."

Without considering the constitutionality of this enactment, because of the fact that it incorporates by reference provisions of a law which it at the same time repeals, it is sufficient to say that if there was no provision of law for the fixing of such fees in the police court of said city the aforesaid provision of Section 36 of said act could have no force. This act was repealed by an act to be found in 103 Ohio Laws, 682, passed April 18, 1913, which act also carries the same provision, with an amendment (page 696), however, that the "court * * * by rule * * * may establish a schedule of fees and costs to be taxed in all actions and proceedings, in no case to exceed fees and costs provided for like actions and proceedings by general law."

These provisions, however, can have no application to the fees earned prior to their enactment.

The claim of the trustees of the police relief fund to the fees in question, upon the ground that the defendant Kohler did not personally perform the services for which said fees were taxed, but that said services were rendered by subordinate police officers and their claims assigned to said trustees, must also fail, because what has been said here in respect to the lack of authority for the allowance of said fees to a chief of police applies also to all police officers. There is no statute fixing the fees in a police court of any police officer in state criminal cases. We are inclined to the opinion that under Section 13500 a warrant should be issued to the officer who is expected to serve the same, and such officer must personally perform that service to be entitled to any fees. But this matter is not material in the case of a chief of police or police officer in state criminal cases, for there is no right to fees in the first instance in a police court.

In view of the foregoing observations we are of the opinion that none of the pleadings in the original action states a cause of action and that the learned trial court should have sustained demurrers as to all pleadings before it. And we would now render the judgment that court should have rendered were it not for the fact that we believe this case should be remanded to the court of common pleas for the purpose of allowing the state of Ohio to intervene by a cross-petition setting up its right to the money now in the treasury

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of this county to the credit of said chief of police in the cases here in controversy.

Judgment reversed, and cause remanded for further proceedings according to law.

WALTERS and SAYRE, JJ., concur.

Judges of the Fourth Appellate District, sitting, by designation, in place of Judges GRANT, CARPENTER and LIEGHLEY of the Eighth Appellate District.

GREGG ET AL. v. CLAPHAM ET AL.

Negligence—Road barricaded during improvement—Injury to motorcyclist—Charge to jury—Speed of motorcycle—Contributory and imputed negligence—Whether road closed a question for jury.

1. In an action for injuries resulting from a motorcycle colliding with an obstruction in the road, placed there by contractors as a barricade while the road was being improved, it is not error to charge the jury that if the machine "was being driven at a higher rate of speed than twenty miles an hour at the time of the accident, then the boys so riding and driving the machine were violating the laws of Ohio, and such act would be evidence of negligence on their part, and should be considered by you upon the question of contributory negligence."
2. Nor is it error to refuse to charge that "If you find from the evidence that the witness, Beaver, in the management of the motorcycle, did not use ordinary care, and that his want of ordinary care was the proximate cause of Leon Clapham's injuries, then the said Leon Clapham is charged with the negligence of said Beaver, and there can be no recovery in this action."
3. Whether or not the barricade which had been placed across the road made it a closed road was a question of fact for the jury, to be determined in the light of the surrounding circumstances and the law applicable to the case.

(Decided March 24, 1917.)

ERROR: Court of Appeals for Licking county.

Messrs. Marshall & O'Neil and Messrs. Fitzgibbon, Montgomery & Black, for plaintiffs in error.

Mr. Phil. B. Smythe, for defendants in error.

HOUCK, J. This is a proceeding in error seeking to reverse the judgment of the common pleas court of Licking county, Ohio. The parties here stand in the reverse order to that in which they stood in the court below. The petition, in substance, averred that the plaintiff was the father of one Leon Clapham, who was under 18 years of age and lived with and was supported by the plaintiff, who was entitled to the services of the said Leon Clapham; that on the 13th day of July, 1913, the board of county commissioners of Licking county, Ohio, was engaged in repairing a certain public road running from Newark to Granville in said county, by covering the surface of said road with cement or concrete; that on said date the defendants, W. B. Gregg and H. D. Fletcher, were partners, and as such partners were engaged in performing the work of said repair under a contract with said board of county commissioners, whereby said board paid said Gregg and Fletcher a certain definite sum of money for furnishing the materials and the labor necessary for said repair; that on said 13th day of July, 1913, said road was open for travel, and was on said date and for a long time prior thereto in general use by the traveling public, with the knowledge and consent of said defendants; that on said day the defendants had

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stretched a wire across said road about three feet above the surface thereof, that said wire was in such position on said day, that said wire was not marked or located by any signal or device to warn passengers on said road that the same was in such position, and that said wire could not be seen by persons in vehicles on said road; that on said day, while said Leon Clapham was lawfully traveling on and over said road on a motorcycle, and without any fault or negligence on his part, he ran into and against said wire and was thrown with great violence to the surface of said concrete, suffering thereby a broken nose, a broken jaw and a fracture of his skull, and was otherwise bruised and injured; and that by reason of said injuries the plaintiff was thereby deprived of the services of said Leon Clapham, to his damage in the sum of \$1,000.

The plaintiff further alleged in his petition that he had expended the sum of \$367.25 in the necessary and proper care of the said Leon Clapham by reason of said injuries, and that said injuries were caused by the negligence and carelessness of the defendants, in stretching said wire across said road and leaving the same unguarded, and in not providing some method of warning travelers of its presence in said location; that the injuries complained of were without fault on the part of said Leon Clapham and were caused by the negligence of the defendants. Plaintiff therefore prayed for judgment against said defendants in the sum of \$1,367.25.

The answers filed by said defendants were in the nature of general denials to all of the material

allegations contained in plaintiff's petition; and further set up and alleged that whatever injuries resulted to the said Leon Clapham were caused by his own fault and negligence and not by the fault of the defendants, or either of them.

The cause was submitted to a jury and a verdict returned in favor of the plaintiff in the sum of \$300.75. The usual motion for a new trial was filed, heard and overruled, and a judgment entered on the verdict. A bill of exceptions was prepared, containing all of the testimony and evidence offered at the trial below, and, together with a petition in error, was filed in this court for review.

Numerous grounds of alleged error are set forth in the petition in error, but we do not deem it necessary to discuss any of the alleged errors save and except those urged by counsel for plaintiffs in error in oral argument.

As one of the grounds for a reversal of the judgment below learned counsel for plaintiffs in error insist that Leon Clapham was, at the time he received the injuries complained of, a trespasser. We have examined the bill of exceptions with reference to this alleged claim, and are free to say that from the proven facts upon this question, applying the law applicable thereto as to who is or who is not a trespasser, we are bound to and do reach the conclusion that this claim of alleged error is not well taken.

It is further urged that the trial judge refused to give a special request offered by defendants below with reference to Leon Clapham having been guilty of negligence *per se*, which resulted in the injuries he received. We have examined the

record, but have been unable to find any such written request so refused by the trial judge. On page 312 of the bill of exceptions we find that counsel for defendants below requested the court, before argument, in writing, to give to the jury the following instruction, which was given by the court:

"If you find from the evidence that the motorcycle was being driven at a higher rate of speed than twenty miles per hour at the time of the accident, then the boys so riding and driving said machine were violating the laws of Ohio, and such act would be evidence of negligence on their part and should be considered by you upon the question of contributory negligence."

This charge as to the law was given by the trial judge, at the request of the defendants below, and we do not see how they can now complain. We think as a proposition of law it is sound, and applicable to the proven facts in the case at bar.

Counsel for plaintiffs in error, as another ground for a reversal of the judgment in this case, insist that the trial judge was in error when he refused to charge upon the subject of imputed negligence, as contained in the special request found on page 316 of the bill of exceptions, which was requested to be given by the defendants below, and which the court refused to give. This special request reads as follows:

"If you find from the evidence that the witness, Beaver, in the management of the motorcycle, did not use ordinary care, and that his want of ordinary care was the proximate cause of Leon Clapham's injuries, then the said Leon Clapham is charged

with the negligence of said Beaver, and there can be no recovery in this action."

We do not feel it necessary to discuss at length this proposition of law. We think upon its face it clearly shows, in the light of the established facts in this case, that if the court had given this charge it would have been improper. In our opinion the court committed no error in refusing to give this request to the jury.

It is strenuously urged by the plaintiffs in error that the road in question was not opened for public travel; but that it was so barricaded and protected by the defendants below that it was not an open road, but was, in fact and in law, a closed road. Whether or not the road at the time of the injury complained of was or was not a closed road was a question of fact to be determined by the jury in the light of the evidence offered upon this subject and the law applicable thereto, as charged by the court. The jury having passed upon this fact and having found adversely to the defendants below, from our examination of the general charge and propositions of law submitted to the jury bearing upon this question we are bound to and do hold that there is no prejudicial error in this respect in the record. The general charge of the court covers every phase of the case at bar, and, as we view it, is a clear and concise statement of each and all of the propositions of law applicable and pertinent to the established facts, and covers each and all of the issues raised by the pleadings in the case.

Upon our examination of the record there is no error contained therein which is in any way

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prejudicial to the substantial rights of the plaintiffs in error, and, therefore, the judgment of the common pleas court is affirmed.

Judgment affirmed.

POWELL, J., concurs.

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VILLAGE OF ST. BERNARD ET AL.

ROBERTS, ADMR., v. THE VILLAGE OF ST. BERNARD
ET AL.

*Establishment of public road—Notice to property owners—Effect
of failure to notify owners of land taken.*

The failure, in a proceeding for the establishment of a public county road, to give a notice required for the purpose of furnishing an opportunity to the owner of land taken for the opening of the road to claim compensation, does not render invalid the proceedings for the laying out of the road.

(Decided February 7, 1917.)

APPEAL: Court of Appeals for Hamilton county.

Mr. Albert H. Morrill and Mr. James E. Robinson, for plaintiffs.

Mr. S. B. Hammel and Mr. John R. Quane, for defendants.

JONES, OLIVER B., J. These two cases were heard together on appeal from the court of insolvency, as they involve the same issues.

Two questions are involved in the cases: first, whether Murray Road, within the village of St. Bernard, running from Carthage avenue to the Miami canal, was a public highway at the time the improvement was made; and, second, whether the several tracts of land assessed for this improvement of Murray Road would be benefited by the improvement in an amount equal to the amount assessed against them.

A great deal of interesting evidence was offered in regard to the original use of this road. It was shown that it was opened as a private road or lane, and has been used for at least 75 years, and that during the latter part of that time it was used more or less by the general public in passing between Carthage avenue and the canal bridge. But it is not necessary in this proceeding to determine the character of the road prior to the year 1890. At that time, upon a petition filed by James M. Murray and others, under proceedings for the laying out of the county road, as provided by law, the county commissioners took certain proceedings and laid out a county road over the line of Murray Road, as later improved, and extending from Carthage avenue clear to Paddock Road. A record of these road proceedings, from the county records, has been produced in evidence. These proceedings show that notices were given in accordance with Section 4641, Revised Statutes (Sections 6865 and 6866, General Code); that the regularity of these notices was found by the county commissioners, and the viewers appointed, as provided by Section 4642, Revised Statutes (Section 6867, General Code); and that the view-

ers and county surveyor proceeded to lay out the road.

It is objected that this record fails to show that notices were given under Section 4645, Revised Statutes (Section 6872, General Code), to the owners of land on the north and south sides of this road between the canal and Carthage avenue, although the record does show that notices were given to property owners for that part between the canal and Paddock Road. The failure to give this notice is the only objection made by the plaintiffs as to the regularity of these road proceedings, and they contend, because of the failure of the record to show such notice, that such part of the road never became a public county road.

The omission to give the notice required by Section 4645, Revised Statutes, would not render the proceedings for the laying out of the county road invalid. The notice required by that section is for the purpose of furnishing an opportunity to the owner of land taken for the opening of a county road to claim compensation. If such landowner was not properly notified, his right to compensation might not have been cut off by the proceedings. Whether or not he was duly compensated is not material to this case, but the fact that no compensation was claimed or allowed rather goes to show that that part of the road had already become by use a public road. But whether so or not, the notice required by the last-mentioned section is not jurisdictional in its nature. *Beebe v. Scheidt et al.*, 13 Ohio St., 406, and *Hasler et al. v. Hitler et al.*, 11 W. L. B., 246 (Pickaway Co. Dist. Ct.).

By these proceedings Murray Road became a county road, was regularly platted and recorded as such in the county road records, and was so recognized by the county commissioners in March 1892 in their appointment of a bridge-tender for the bridge at the canal. It was indicated as a county road on the annexation plat, when the tract in which it was located was annexed to the village of St. Bernard, and was so recorded in the recorder's office. And as such county road it became by such annexation a public street of the village of St. Bernard. *City of Steubenville v. King*, 23 Ohio St., 610.

But, outside of the proceedings of the county commissioners in laying out this highway as a county road, the action of W. G. Roberts, trustee, and of the Ross heirs, in making their deed to the Norfolk & Western Railway Company, with their plat attached thereto, which was recorded in the recorder's office, and in executing subsequent deeds and leases, in which descriptions were made referring to such plat and recognizing Murray Road as a public highway, operated as a dedication of Murray Road, if it was not already a public street. Especially does this appear, when coupled with recognition of its existence as a public street, by the action of the village in putting waterpipe and electric lights therein, cinder sidewalk and temporary macadam repairs thereon, and passing the ordinance establishing the grade and ordering its improvement. *City of Cincinnati v. Leeds*, 3 Ohio App., 123; *Winslow v. City of Cincinnati*, 6 N. P., 47, and *Wright v. Village of Oberlin*, 3 C. C., N. S., 242.

The Harkness & Cowing Company and The Elmwood Castings Company both joined in a petition for the improvement of this part of Murray Road, in which it was described as a public thoroughfare, and both of these companies are therefore estopped from questioning the title of the village, or its right to improve Murray Road. *Tone v. City of Columbus*, 39 Ohio St., 281.

The court is therefore compelled to hold against the plaintiffs on the first proposition, and find that Murray Road was a public highway at the time the improvement was made.

The assessment made in this case was on the benefit plan. Murray Road affords the only access as to all the tracts of land in the case, except the one at the corner of Carthage avenue, and it cannot be found under the evidence that the improvement of this road was of no benefit whatever to these tracts of land, merely because they are now used for manufacturing purposes, or are most available for such purposes.

A full consideration of all of the evidence offered leads the court to believe that all of these tracts have been benefited to the extent of the several amounts assessed upon them.

The petitions in both cases must therefore be dismissed at the costs of the plaintiffs.

Petitions dismissed.

JONES, E. H., P. J., concurs.

GORMAN, J., not participating.

EWALT, ADMR., v. AMES ET AL.

Jurisdiction on appeal—When to challenge same—Appointment of administrator de bonis non—Gifts inter vivos—Certificates of stock—Subscribed and delivered to donee—But not endorsed by donor—Effect of donor receiving dividends—Wills—Election by widow—Execution of mutual wills—Election in law and in fact.

1. The probate court having, on application made therefor, refused to appoint an administrator *de bonis non*, and the court of common pleas, after a hearing on the merits on appeal, having made such appointment, the parties cannot thereafter contest the validity of the appointment by contending for the first time that appeal would not lie from the judgment of the probate court.
2. A father, residing in Mount Vernon, in consideration of love and affection, executed and delivered to his daughter four years before his death a written assignment of a large portion of his personal estate, consisting of stocks and securities and other property, including 230 shares of stock of The Western Union Telegraph Company, and caused her name to be written on the back of the certificates of stock as assignee thereof, and the certificates were found in her possession at her home in Washington, D. C., after his death, but he had omitted to attach his signature to the transfer on the back of the stock certificates. *Held*: First. That the gift was complete notwithstanding the omission of the donor's signature on the back of the certificates. Second. The receipt by the father of some of the dividends declared after the execution and delivery of the instrument of transfer is not, in view of the affectionate relations existing between the parties, so inconsistent as to impeach the gift.
3. While the law requires that the acts of a widow, in order to constitute an election by conduct on her part to take under the will of her husband, must clearly and unequivocally evince a purpose on her part so to elect, yet where the husband and wife have together deliberately planned an arrangement for the disposition of their respective estates by will, and have executed their wills to carry out that purpose, a court will be readily convinced that she has elected to take under the will.

(Decided May 23, 1917.)

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ERROR: Court of Appeals for Knox county.

Messrs. Pomerene, Ambler & Pomerene; Messrs. Williams & Nash and Mr. F. O. Levering, for plaintiff in error.

Mr. H. C. Devin; Messrs. Jones & Jones; Mr. Carl Norpell and Mr. Frank Moore, for defendants in error.

RICHARDS, J. Columbus Ewalt, as administrator *de bonis non* of Elizabeth Delano, deceased, commenced this action in the court of common pleas against the defendant Benjamin Ames, individually, and as surviving executor of the last will and testament of Columbus Delano, deceased, and also against other defendants, for a citation to appear and disclose as to the assets of the estate of said Columbus Delano, deceased, in their possession or under their control. Benjamin Ames filed a second amended answer denying most of the allegations contained in the petition, and setting up numerous defenses against others therein.

On the trial in the court of common pleas the issues were found and adjudged with the defendants, and the petition dismissed. Error is prosecuted to this court and a reversal of the judgment so rendered is demanded upon numerous grounds.

Columbus Delano was a distinguished citizen of Mount Vernon who died testate on October 26, 1896, leaving as his widow, Elizabeth Delano. The widow died testate in August, 1897. At the time Columbus Delano executed his last will and testament, to-wit, on November 13, 1891, he was

eighty-two years of age, had been a brilliant lawyer, was a man of wide experience in business affairs, had represented Knox county in the general assembly, had represented his district in congress, had served as commissioner of internal revenue during the first term of President Grant, and as secretary of the interior during the second term of that president. His wife, Elizabeth, appears by the evidence to have been a lady of education and refinement and to have enjoyed his implicit confidence, and to have been entirely familiar with his numerous business transactions and with the extent of his large estate. His will is shown to be in her handwriting, and her will was prepared in her own handwriting, but before she executed it she had the same typewritten by an attorney at law. At the time of Columbus Delano's death he had an estate variously estimated, but apparently exceeding \$150,000 in value. His wife, also, was the owner of a very considerable estate. They had two children, John S. Delano and Elizabeth Delano Ames, the latter residing in Washington, D. C. Mrs. Ames had three sons and one daughter, and John S. Delano was married and had a daughter named Eleanor Delano Shealey. John S. Delano died in 1896, shortly before the death of his father Columbus Delano.

While many defenses are urged in this case to the contentions made by the plaintiff, we find it necessary to discuss only three of them.

First: It is insisted that Columbus Ewalt is not the administrator *de bonis non* of Elizabeth Delano, deceased.

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Second: It is insisted that the property which is sought to be reached by this proceeding was given by Columbus Delano to his daughter, Elizabeth Delano Ames, by completed gift, *inter vivos*, a number of years before the donor's death.

Third: It is insisted by the defendants that the widow, Elizabeth Delano, elected in fact to take under the will of Columbus Delano, and that having done so she was not by the terms of that will entitled to any of the assets now sought to be reached.

If either of the defenses named should be found to be sustained the plaintiff can not recover. We will take up first the issue as to the appointment of Columbus Ewalt as administrator *de bonis non*, with the will annexed, of the estate of Elizabeth Delano, deceased. In her will she named as executor H. H. Greer, a prominent attorney of Mount Vernon, who qualified and served as such executor, filing a final account and subsequently resigning his trust in May, 1911, the resignation being accepted by the probate court. Shortly thereafter application was made in the probate court of Knox county by Eleanor Delano Shealey for the appointment of an administrator *de bonis non* of the estate, on the claim that there were assets belonging to the estate, to the amount of many thousands of dollars, which were unadministered. The probate court on hearing this application denied the same and refused to appoint an administrator *de bonis non*. The proceeding was taken on appeal to the court of common pleas and was there heard on its merits, the court of common pleas adjudging that an administrator *de bonis non* should be appointed; and the court thereupon proceeded to and

did appoint the plaintiff, Columbus Ewalt, as such administrator *de bonis non*. So far as the record before us discloses, the adjudication and appointment thus made in the court of common pleas were never reviewed on error or appeal.

It is insisted, however, that the validity of the appointment may be contested in this case, and it is contested on the ground that the decision of the probate court refusing to appoint an administrator *de bonis non* was not appealable and that the court of common pleas had no jurisdiction to make the appointment. It appears that the parties went to trial on the merits in the court of common pleas in the case so attempted to be appealed, and it does not appear that any objection was made in that court to the appealability of the proceeding. We think it not important to review the statutes on the question of whether an appeal lies from the refusal of the probate court to appoint an administrator *de bonis non*. Whether or not such appeal would lie, it is apparent that error could have been prosecuted to that judgment of the probate court.

The parties having gone to trial on the merits in the court of common pleas, and having permitted the action to proceed to judgment without objection to its appealability, so far as the record shows, and on a matter in respect to which that court could have taken jurisdiction on error, they could not thereafter be permitted to question the jurisdiction of the court to try the case on appeal, even if they had so attempted in that action; much less can they do so collaterally in this proceeding. *Drake et al., Trustees, v. Tucker et al.*, 83 Ohio St., 97; *Cadwell v. Cadwell*, 93

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Ohio St., 23; *Barner v. Barner*, 93 Ohio St., 477, and *State, ex rel. Faber, Receiver, v. Jones et al.*, 95 Ohio St., 357.

The two cases from 93 Ohio St., cited, were tried in the court of appeals by the judges now sitting in the case at bar.

Furthermore, it must be remembered that a proceeding for the appointment of an administrator is one *in rem*, and, the court having jurisdiction, its decision in that class of proceedings binds the whole world. That an application for the appointment of an administrator is a proceeding *in rem* was directly announced by the supreme court in *Cross v. Armstrong*, 44 Ohio St., 613, in the course of the opinion delivered by Judge Spear, at page 624.

It was held, *In re Guardianship of Oliver*, 77 Ohio St., 473, that a court of common pleas could appoint a guardian of an imbecile on appeal from an order of the probate court refusing to make an appointment and dismissing the application. The court in that case held that the common pleas court was empowered to make the appointment. It is true that the statute specifically authorizes an appeal from an order refusing to appoint a guardian, while no such specific provision is found as to the refusal of the probate court to appoint an administrator. That distinction, however, becomes unimportant in view of the facts already recited showing that the parties on the appeal went to trial on the merits of the case without objection.

We conclude, therefore, that the defendants can not now contest the validity of the appointment of Columbus Ewalt as administrator *de bonis non* of the estate of Elizabeth Delano, deceased.

We proceed therefore to determine the issue as to whether the assets sought to be recovered in the proceeding at bar were really assets of the estate at the time of the death of Columbus Delano, or whether he had effectually parted with them by gift to his daughter, Elizabeth Delano Ames. The validity of the gift depends largely upon the execution and delivery of an instrument dated February 16, 1892, and the delivery of the property pursuant to such instrument. That instrument recites, in substance, that in consideration of natural love and affection he sells, assigns, transfers and sets over to his daughter, Elizabeth Delano Ames, of Washington, D. C., all of his personal property, consisting of bonds, notes, mortgages, choses in action, stocks and securities, except his bank stock and the live stock on his farms and the farming implements and household goods. The original of this instrument had been written out and was carried by Mr. Delano to the law office of Mr. Greer in Mount Vernon, and, at Delano's request, R. M. Greer copied the same on the typewriter, and it was there signed in his presence and the acknowledgment of the signature taken before him as notary public. At the time of the execution of this instrument Columbus Delano was the owner of 230 shares of the capital stock of The Western Union Telegraph Company and of stock and securities in various other companies. The stock of The Western Union Telegraph Company, however, is the item about which most of the controversy in this case revolves. Subsequent to the making of this instrument Columbus Delano received from The Western Union Telegraph Com-

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pany stock dividends on this stock amounting to 23 shares, and on February 7, 1894, he purchased 47 additional shares, making 300 shares in all.

The assignment of his personal property to his daughter is shown to have been delivered to her in the summer of 1892, when she was visiting at her father's home, known as Lake Home, about a mile from the city of Mount Vernon. The certificates of stock were never signed over on the back by Columbus Delano to his daughter, but the assignment was made after his death by the defendant Ben Ames, as executor, who is the grandson of Columbus Delano and a son of Elizabeth Delano Ames, the executor claiming to act under authority of the written assignment to which reference has been made. There is, however, endorsed on the back of these certificates in a blank printed form prepared for that purpose the name "Mrs. E. Delano Ames," and it is shown that in each instance this name appears in the handwriting of a confidential friend of Columbus Delano, who was employed in the First National Bank of Mount Vernon, in which bank Mr. Delano was a stockholder and director, and that the death of this friend occurred before that of Columbus Delano, so that the name of Mrs. Delano must of necessity have been written on the back of the certificates before the death of Mr. Delano. It was in this bank that Mr. Delano kept his private papers. After the death of Columbus Delano these certificates of stock and other securities claimed to have been passed by gift to Elizabeth Delano Ames were found in her possession in Washington, D. C., and it was at her request that

her son Ben Ames, as executor, completed the formal transfer on the back of the stock by signing his name thereto as executor.

It is apparent that the certificate for 47 shares of stock in The Western Union Telegraph Company could not pass directly and specifically under the provisions of this assignment and gift by Columbus Delano to his daughter, because it represents stock which he did not at that time own, but subsequently purchased. The evidence shows, however, that he had contemplated making a gift of 300 shares of stock in this company to his daughter, which was sufficient, in connection with the other evidence, to justify the finding by the trial judge that he had made and completed such gift.

The evidence shows that although this certificate for 47 shares of stock was taken in his name and paid for by him, yet he intended it as a gift to his daughter to complete the full number of 300 shares which he had in mind at the time of the execution of the instrument transferring securities to her.

It is strenuously insisted by counsel for plaintiff that the fact that Columbus Delano had not signed his name to the endorsement of the stock on the back thereof shows that his intention was not to complete the gift to his daughter, but to retain control himself of the stock, notwithstanding the execution and delivery of the written transfer already mentioned and the subsequent delivery of the stock. We have no doubt that the execution and delivery of the written transfer, followed by the delivery of the securities, completed the gift without the signature of the donor on the back of the certificates.

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Neither is the fact that Columbus Delano received some of the dividends subsequent to the transfer sufficient evidence to overcome the gift shown by the written transfer, delivery of the securities, and the conduct of the parties. By reason of the affectionate relations existing between Mr. Delano and his daughter it may well be that she was content to have him receive a part of the dividends declared on the stock, and the fact that he did receive some is not inconsistent with the completion of the gift. The oral evidence shows that he was solicitous about the continued support of his daughter and her children, and this evidence is supported by the language of his will in the bequest with relation to the children. He had already advanced to his son large sums of money and property, amounting perhaps to one-half of his estate.

By reason of the fact that the certificates of stock were not themselves assigned to Elizabeth Delano Ames by written endorsement on the back thereof, the dividends on the same continued to be issued by The Western Union Telegraph Company in the name of Columbus Delano. The evidence is not very clear as to who really received and appropriated the proceeds of these dividends subsequent to the execution of the instrument of transfer, but a considerable number of the drafts for the quarterly dividends on this stock were made payable to the daughter. The evidence is of such a character as to amply justify the common pleas judge in finding, as he did, that the gift to Elizabeth Delano Ames was completed and was a valid one, and that the securities were not a part of the

estate of Columbus Delano at the time of his death. All through the record it is apparent that the relations existing between Columbus Delano and his daughter were very close. Indeed, the first item of his will gives all of his correspondence and private papers to her and expresses a desire that no one shall have access to or direction over the same without her consent.

The conclusion reached would necessitate an affirmance of the judgment, for the plaintiff can not maintain an action for concealing assets of an estate where the evidence discloses that the assets have been disposed of by the testator in his lifetime. There is, however, another defense urged and we have given it careful consideration. That defense is that the widow of Columbus Delano elected in fact by her words and conduct to take under the will, and if she did so the securities now sought to be reached would not pass to her even though they had been a part of the estate of Columbus Delano at the time of his death.

It will be unnecessary to review all of the evidence bearing on the subject of the widow having made an election, but it will be pertinent to indicate some of the facts bearing on that subject appearing in numerous places throughout the oral and documentary evidence. It is perfectly apparent that Mr. and Mrs. Delano had entered into an agreement with each other on the subject of the disposition to be made of their property, in pursuance of which each had conveyed certain property to the other, and their respective wills were made in fulfillment of the terms of this agreement. It was understood between them that the will of Mr. De-

lano was to provide for his grandsons and that Mrs. Delano was to provide for the granddaughters in her will. This understanding was carried out by the terms of the wills. Mrs. Delano fully understood this matter, and the evidence in the record impresses the court that she was extremely anxious that the provisions of their wills should be carried out. This joint project, which was carefully planned by Mr. and Mrs. Delano, could not be carried out if she should take under the law rather than under the terms of the will left by him. Both Columbus Delano and his wife repeatedly stated to several of their intimate friends that they had made this arrangement, and they indicated to these friends their wish and desire that the same should be carried out. Shortly after the death of Columbus Delano, in the presence of several witnesses, and upon the occasion of the reading of his will, she again expressed her earnest wish that the provisions of the will should be carried out and an intention to do her part to accomplish that object. Indeed, so far as the record discloses, every statement made and act performed by her in relation to her husband's estate indicated unequivocally that she elected to take under the will. We search the record in vain for any evidence looking to a contrary intent.

Certain payments were made to her by the executors and receipted for by her as being payments under the will of her deceased husband. We would, however, in the absence of this receipt, have no hesitancy in saying that the record contains ample evidence to justify the trial judge in finding that she had elected to take under the terms of

the will. That will gave her the right to use the entire income of the estate for her life if she required it. We are, however, entirely in accord with the following statement made by the trial judge in the opinion rendered by him in this case:

"In our judgment Mrs. Delano would not have refused to take under her husband's will and elected to take under the law if in so doing she could have secured the entire estate of her husband, for in so doing she would have repudiated the deliberately planned arrangement which she and her husband had made for the distribution of their estates."

The principles announced in the case of *Baxter, Admr., v. Bowyer et al.*, 19 Ohio St., 390, are entirely applicable to this case. See also *Lessee of Thompson v. Hoop*, 6 Ohio St., 481.

Counsel on both sides cite and rely on *The Colored Industrial School of Cincinnati v. Bates, Admr., et al.*, 90 Ohio St., 288. In reaching the conclusion that Mrs. Delano elected to take under the will of her husband we are not unmindful of the language of the court in the case just cited, that the acts relied on to constitute an election by conduct must be plain and unequivocal, done with a full knowledge of rights under the will and under the law respectively and of the true condition of the estate and generally be of such long duration as clearly shows a purpose to take under the will. In the absence of evidence to the contrary the presumption, of course, is that the widow chooses to take under the law rather than under the will. That presumption, however, is a rebuttable one, and in a case where the evidence clearly shows a

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long-continued purpose on the part of both the husband and wife to make a disposition of their property by will, and where that purpose has been carried out with the full knowledge and approval of both, the presumption is not difficult to rebut. We have no hesitancy in reaching the conclusion in this case that it is rebutted by the evidence, and that Mrs. Delano is shown by her words and conduct to have elected to take under the will.

Some of the evidence on this subject comes from H. H. Greer and R. M. Greer, who are claimed to have been attorneys for Mr. and Mrs. Delano and to have received the information under such circumstances as to make it privileged and render them incompetent to testify on this subject. It is apparent that much of the information which they received from the Delanos on this subject was imparted to them for the very purpose of having them make it manifest when the proper occasion should arrive. When we remember that Columbus Delano was himself an eminent member of the bar, and that he and his wife determined between themselves as to the disposition of their property and prepared their own wills, simply going to attorneys for the purpose of having them formally executed, we are not able in this instance to assent to the contention that the relation of attorney and client existed in respect to these matters, nor that the information given to H. H. and R. M. Greer was given under such circumstances as to be privileged. However, the case being in this court on error, we would be unable to say, even without the testimony of these attorneys, that the evidence was insufficient to maintain the finding and judgment of

the court that Mrs. Delano had elected to take under the will of her husband.

Finding no prejudicial error, the judgment will be affirmed.

Judgment affirmed.

CHITTENDEN and KINKADE, JJ., concur.

Judges of the Sixth Appellate District sitting in place of Judges POWELL, HOUCK and SHIELDS of the Fifth Appellate District.

O'GRADY v. THE CITY OF NEWARK.

Releases—Personal injury—Receipt admissible in evidence, when—Bar to action—Charge to jury—Reversals.

1. A receipt purporting to be a release from the claim sued on, when properly identified, is competent as evidence under the circumstances presented by this case, but its sufficiency and weight are matters for determination by the jury.
2. A reviewing court will not disturb the finding of a jury as to whether or not the purported settlement is a bar to the plaintiff's action, where the jury has been instructed that the payment made to plaintiff or to some one for him does not constitute a defense to the action if the settlement was made at a time when the plaintiff was in such a mental condition, either by reason of his injuries or from opiates, that he did not understand the nature and effect of the alleged settlement.

(Decided March 24, 1917.)

ERROR: Court of Appeals for Licking county.

Mr. Frank A. Bolton, for plaintiff in error.

Mr. Ralph Norpell, city solicitor, for defendant in error.

HOUCK, J. The parties in this proceeding stand here in the same position as they stood in the court below. The action below was one to recover damages for alleged injuries received by Edward M. O'Grady by reason of the explosion of a small boiler used in a peanut roaster, which plaintiff claimed was permitted to be operated on a certain street in the city of Newark, Ohio, which boiler, by the carelessness and negligence of the city, through its agents and officers, exploded, a part thereof striking said plaintiff on the right leg and throwing him violently to the ground, cutting his leg and injuring his head, to his damage in the sum of \$5,000. The plaintiff averred that said injuries were in no way caused by any negligence on his part.

The city filed its answer, setting up two defenses: first, a general denial; second, that it had fully settled with plaintiff and paid to him the full amount that it agreed to pay as per the terms and conditions of said contract of settlement. Defendant prayed that the petition of plaintiff be dismissed.

The plaintiff filed a reply in the nature of a general denial to said second defense, and affirmatively averred that at the time of the alleged settlement he was mentally incapacitated from making a valid and binding settlement, or contract of release.

Upon the issues thus raised by these pleadings, the cause was submitted to a jury upon the evidence, and after due deliberation the jury returned a verdict for the defendant. A motion for a new trial being overruled, judgment was entered on the verdict. Plaintiff in error now seeks a reversal

of the judgment so entered, for the following reasons:

1. That the trial judge erred in admitting certain evidence.

2. That the trial judge erred in not submitting special request number four to the jury.

We have made a careful examination of the record in this case and have read the evidence as presented in the bill of exceptions, for the purpose of satisfying ourselves as to the claims of plaintiff in error. Counsel for plaintiff in error earnestly urges that the trial court erred in permitting a certain receipt, alleged to have been signed by plaintiff in error, which receipt purported to be a release of all his claims for damages against said city, to be offered in evidence; and which receipt tended to prove the settlement relied upon by the defendant.

From our examination of the bill of exceptions, we are fully satisfied that the receipt was sufficiently identified to warrant the court in admitting it in evidence, as an exhibit to go to the jury, in connection with certain oral testimony, as tending to prove the claim as to the settlement alleged to have been made between plaintiff and defendant. We feel that, from all the circumstances and surroundings of the case, and the testimony offered by plaintiff and defendant as to what occurred at the time of the claimed settlement and the execution and delivery of the receipt in question, it was proper evidence to go to the jury; but, as to its sufficiency and the weight to be given to it, these were questions for the jury to determine.

The second error which counsel for plaintiff in error alleges as a ground for reversing the judg-

ment of the court of common pleas is the refusal of the trial judge to submit to the jury a certain special request designated as number four, which reads as follows:

"The court charges you that the defendant has pleaded as a second defense a settlement or satisfaction of the claim of the plaintiff for damages, and that the defendant must show not only that there was an agreement between the parties, but that the satisfaction of the same has been full, perfect and complete. If the jury should find that there is still due the defendant from Sam Kantress some money under the agreement alleged to have been entered into, and that the agreement has been but partially satisfied, said settlement is no defense to the action of this plaintiff, but the amount paid may be credited on any amount that may be found due the plaintiff."

We have examined this proposition of law in the light of the issue raised by the second defense and the reply thereto, and the facts as established by the evidence, and we hold that the court was not in error when it refused to submit the above proposition of law to the jury.

Abstract propositions of law, requested to be given to a jury before argument, must be given by the trial judge if they are pertinent to the issue, or issues, raised by the pleadings, and applicable to the established facts in the case. Otherwise they should be refused. It is apparent from an examination of the request by the plaintiff, if we apply the rule herein laid down as to what special requests in writing before argument shall be submitted to the jury, that request number four was properly

refused. The question as to whether or not there was a settlement between the parties to this lawsuit which would bar the plaintiff from maintaining his action, and the question as to whether or not at the time of the alleged settlement the plaintiff was mentally incapacitated from making such agreement, were questions of fact which were submitted to the jury, and were passed upon and determined by it; and in face of the finding of the jury, and in the light of the law which was given to the jury by the court, as contained in special request number three, and given before argument at the instance of counsel for the plaintiff below, we do not see how he can now properly complain. We believe this request to be the law, and that it clearly pertains to the issues raised and the facts to be determined in the case under review.

Special request number three reads as follows:

"The defendant in this action has pleaded as a second defense a settlement of the damages suffered by the plaintiff resulting from the explosion of said peanut roaster or warmer, and the court charges you that if you should find that at the time said receipt was signed and said alleged settlement was made, the plaintiff was in such a mental condition either by reason of the injuries inflicted upon him, or the administration of opiates, or both, or any other reason, that he could not understand and did not understand the nature or effect of an ordinary business transaction, the payment alleged to have been made to the plaintiff, or to any one for him, is not a defense to the action of the plaintiff herein."

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In passing, we might suggest that but two issues were raised by the pleadings in this case, and upon them the cause was submitted to the jury upon the evidence and the law as given to the jury by the trial judge. The verdict of the jury was a general one, in favor of the defendant, and it is not within the province of a reviewing court to determine upon which one of the defenses, or whether upon both, the jury based its verdict.

We think, upon this theory alone, the judgment of the common pleas court in this case might properly be affirmed. The rule of law herein announced is clearly laid down in the case of *McAllister v. Hartzell*, 60 Ohio St., 69, second paragraph of the syllabus, which reads as follows:

"Where two issues are presented in the pleadings for the determination of the jury, and there is a verdict finding the issues for the defendant, and such finding on either issue entitles him to a general judgment in his favor, and a judgment is rendered on the verdict, such judgment will not be reversed for error in the instructions of the court to the jury relating exclusively to one of the issues."

Viewing the record before us as we do, and finding no error therein which would in any way prejudice the substantial rights of the plaintiff in error, we hold that the judgment of the common pleas court should be affirmed.

Judgment affirmed.

POWELL, J., concurs.

SHIELDS, J., not participating.

HEIMLICH v. THE DISPATCH PRINTING CO.

Constitutional law—Privileged publications—Administrative, legislative and judicial proceedings, etc.

Sections 11843-1 and 11843-2, General Code, providing that the publication of fair and impartial reports of proceedings, pleadings and processes shall be privileged, etc., are not in conflict with the federal or state constitution.

(Decided July 18, 1917.)

ERROR: Court of Appeals for Franklin county.

Mr. Joseph L. Stern and Mr. C. A. McCleary,
for plaintiff in error.

Mr. Smith W. Bennett, for defendant in error.

POWELL, J. This is an action for the recovery of damages for an alleged libel of plaintiff in error, Samuel Heimlich, published by the defendant in error.

Three separate causes of action, for three separate publications made on different days, all of which are charged to be libelous, are set forth in the petition below. Plaintiff claims damages in the sum of \$100,000.

By its amended answer the defendant makes four separate defenses:

1. It admits its corporate capacity and that it publishes a daily newspaper known as "The Columbus Evening Dispatch;" it admits the publication of the articles complained of, makes some other minor admissions, and denies each and every allegation set forth in the petition and not ad-

mitted by said amended answer to be true. The admissions made practically leave only the question of damages to the plaintiff as the issue.

2. Defendant claims that the publications made, and on which the action is founded, are fair and impartial reports of certain judicial proceedings in the police court of the city of Columbus, Ohio, in a cause entitled "*The State of Ohio v. Samuel Heimlich*," and of an official investigation then being made by and before the governor, the secretary of state and the attorney general; that said publications were made in good faith and without malice toward plaintiff, who never made any demand or request that a retraction be made.

Wherefore it is claimed that said publications were privileged.

3. The third defense is the same as the second above set forth, except that it belongs to and is made a defense to the second cause of action only, while the second defense above set forth is a defense to the first cause of action only.

4. The fourth defense is a defense to the third cause of action only, and pleads the same matter as the said second defense, save that the three publications were on different days, which are set out; and it is alleged that they were made without malice and without information on the part of the defendant that the same were not true.

A demurrer was filed to the second, third and fourth defenses of said amended answer, and the same was overruled. A motion to strike out was also made and overruled. A reply was then filed denying that said publications, or any part of them, were fair and impartial reports of any police re-

ports in the city of Columbus or of any investigations that were being made by above named officers; denying the good faith of the defendant in making said publications; denying that defendant was without information that the same were not true, or that defendant had reasonable grounds for believing that plaintiff was guilty of perjury or that any of the matters set forth in said publications were true; and denying that said publications were made without malice. The same reply, in substance, is made to the second, third and fourth defenses.

Upon the issues thus made trial was had, resulting in a verdict for defendant on each of said three causes of action. A verdict for the defendant was directed by the court on the third cause of action, while the verdict for the first and second causes of action was returned upon the submission of said causes to the jury.

A motion for a new trial was made and overruled, and a bill of exceptions was taken showing all of the evidence and the charge of the court, as well as all other questions of admission of evidence or otherwise, made on such trial, and the ruling of the court thereon, and the case was brought to this court on error for a review of the judgment below.

The issues, while somewhat complicated, can be simply stated as follows:

Plaintiff claims that certain publications made of him by the defendant were libelous *per se* and asks damages.

The defendant denies malice on its part in making such publications and sets out the facts

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from which it claims that the publications complained of were privileged.

Plaintiff by reply denies the want of malice on the part of defendant, and denies that said publications, or any of them, were privileged.

The claim of privilege on the part of the defendant is based on Sections 11343-1 and 11343-2, General Code, and defendant's whole case depends practically on the construction and validity of said statutes.

The plaintiff contends that said sections, and each of them, are in conflict with both the federal and the state constitutions, and therefore furnish no defense to said defendant.

Upon these respective theories the case is presented to us upon eighteen assignments of error, each of which is ably argued in the briefs filed by plaintiff in error, and all of which, together with the entire record, we have examined with care with reference to each and every assignment of error. Upon such examination of the record and the briefs of counsel, both for plaintiff in error and defendant in error, we have arrived at the conclusion that the judgment of the court of common pleas should be affirmed. There is no such manifest error shown by the record as would justify a reversal of said judgment.

Without entering into a discussion of the merits of the case we think that Sections 11343-1 and 11343-2, General Code, are not in such conflict with either the federal or state constitution as to render them, or either of them, invalid or void, as applied to such a case as shown by the record herein; that the case was fairly submitted to the

jury upon such evidence offered as was pertinent and material, and upon the law as we find it to be; and that the verdict of the jury as returned is not against the evidence, or the weight of the evidence, and is not contrary to law. We do not say there were no errors made on the trial of the case, but we do say that in our opinion there were none that were sufficiently prejudicial to the plaintiff in error to justify us, as a reviewing court, in reversing said judgment, and we content ourselves with the simple statement of the conclusions reached without attempting to add anything to what has been said by counsel in their briefs and by the trial court in the published opinion. 17 N. P., N. S., 161.

It follows that the judgment of said court should be affirmed.

Judgment affirmed.

SHIELDS and HOUCK, JJ., concur.

Judges of the Fifth Appellate District, sitting in place of Judges KUNKLE, ALLREAD and FERNEDING of the Second Appellate District.

THE NEW YORK CENTRAL RAILROAD CO. v. PEAK.

Carriers — Misquotation of tariff freight rate — Shipper to pay regular rate, when — Jurisdiction of common pleas court — Review of judgment of justice of peace — On weight of evidence.

1. The Interstate Commerce Act having been adopted to prevent unjust discrimination in freight rates, the rate of the carrier duly filed pursuant to that act is the only lawful charge and is binding alike on the shipper and carrier.
2. The shipper is charged with notice of the regular fixed tariff freight rate duly filed, and a misquotation of the rate by the carrier's agent will not relieve the shipper from paying the tariff rate although he has made the shipment and paid the quoted rate therefor.
3. By virtue of the provisions of Section 10361, General Code, final judgments rendered before a justice of the peace, whether tried with or without a jury, may be reviewed on the weight of the evidence by proceedings in error.

(Decided June 25, 1917.)

ERROR: Court of Appeals for Lucas county.

Messrs. Doyle, Lewis, Lewis & Emery and Mr. Paul W. Alexander, for plaintiff in error.

Mr. E. H. Ray, for defendant in error.

RICHARDS, J. This action was commenced by The New York Central Railroad Company as successor of The Lake Shore & Michigan Southern Railway Company, before a justice of the peace, to recover an amount claimed to be due it from the defendant, Frederick O. Peak, by reason of an undercharge of freight made by it in a shipment of 15 horses from Boswell, Indiana, to Sylvania, Ohio. At the conclusion of the trial before the justice of the peace a motion was made by the plaintiff for a directed

verdict in its favor, which was overruled, and an exception taken. The jury returned a verdict for the defendant and judgment was rendered thereon. A bill of exceptions was taken setting forth all of the evidence, and error was prosecuted to the court of common pleas, which court affirmed the judgment rendered in favor of the defendant.

On the trial of the case the plaintiff introduced in evidence the printed tariff of freight charges from Boswell, Indiana, to Sylvania, Ohio, showing the rate to be 32 cents per hundredweight when the shipment was made via Sandusky over the L. E. & W. Railway, and thence to Sylvania over The L. S. & M. S. Railway. It also appeared that shipment could be made, and in this case in fact was made, via Fostoria over The L. E. & W. Railway, thence to Toledo over The T. & O. C. Railway, and thence to Sylvania over The L. S. & M. S. Railway. Over this latter route the joint rate was 32 cents per hundredweight to Toledo, and then there was an additional rate from Toledo to Sylvania of $7\frac{1}{2}$ cents per hundredweight. The defendant desired to ship via Fostoria and Toledo and was informed by the company's agent that the rate was 32 cents, the same as if the shipment had been made via Sandusky. But the agent was plainly in error in giving this rate, as it omitted the regular tariff rate, as shown by the schedule on file with the interstate commerce commission, of $7\frac{1}{2}$ cents per hundredweight from Toledo to Sylvania. This action is to recover this latter charge of $7\frac{1}{2}$ cents per hundredweight.

Some contention was made that the railroad official identifying the schedule on file with the in-

terstate commerce commission was not able to say that the rate sheets introduced in evidence embraced all of the rates in force at that time for shipments over the lines of railroad mentioned, but it is entirely clear that they did embrace all the tariff rates on those roads between Boswell, Indiana, and Sylvania, Ohio.

There can be no doubt that the official rate duly fixed and filed with the interstate commerce commission is binding alike on carrier and shipper. The direct question was decided by the supreme court of the United States in *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S., 94. In that case Mr. Maxwell desired two railroad tickets by certain routes which he named, and by oversight the railroad agent quoted him a lower rate than that fixed in the published rates on file with the interstate commerce commission. Mr. Maxwell, as was said in the opinion, was in no way at fault in the matter. He did no more than tell the agent the points to which he wished to go, and the agent fixed the routing in the tickets and named the fare, which Maxwell paid without question. In the case at bar Mr. Peak was without fault in the matter. The error was solely that of the agent. But, under the decision in the case just cited, this error does not relieve the defendant from the duty to pay the regular fixed tariff. We quote the following from the opinion of Mr. Justice Hughes, on page 97:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with

notice of it, and they as well as the carrier must abide by it, unless it is found by the commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

It is perfectly manifest that the object of the Interstate Commerce Act was to have but one rate, from which there could be no departure. The Ohio statute is construed in the same way. *Erie Rd. Co. v. Steinberg*, 94 Ohio St., 189, proposition 4 of syllabus.

This court had a similar question in a case arising in Erie county, based on an intrastate shipment, under the Ohio statute, Section 510, General Code, and we reached a like conclusion. We refer to the unreported case of *The Lake Erie & Western Rd. Co. v. The Kelley Island Lime & Transport Co.*, decided June 12, 1914.

It is contended, however, that there is no authority for the common pleas court or for this court to review the judgment of the justice of the peace on the weight of the evidence, and that the motion for a new trial filed before the justice of the peace was not in accordance with the statute. That motion had as one ground that the judgment was against the weight of the evidence. The statutes of Ohio at one time did not authorize a review of a judgment of a justice of the peace on the weight of the evidence, but such is not the law

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at the present time. The language of Section 10361, General Code, authorizes such review, and the authority there given is not restricted by the language of Section 10352, General Code. See *Koch v. The State*, 73 Ohio St., 131, 138. It is true that the case just cited was a criminal action, but the supreme court there held that the rule contained in Section 10361 is applicable alike to criminal and civil actions.

This court carefully reviewed the sections authorizing the review on error of judgments entered before justices of the peace, and reached a similar conclusion, in the unreported case of *Brand v. Murray et al.*, a Lucas county case, decided on June 7, 1916.

Counsel are not in accord as to whether the request that the justice of the peace should direct the jury to return a verdict in favor of the plaintiff was made before or after the argument. We do not regard the time of the making of that application or request to direct a verdict as important. It was clearly made before the jury had retired, and should have been granted.

For the error in refusing to direct a verdict for the plaintiff the judgments rendered will be reversed and final judgment entered here for the plaintiff in error.

Judgments reversed, and judgment for plaintiff in error.

CHITTENDEN and KINKADE, JJ., concur.

OREBAUGH v. NEU.

Monopoly—Public policy—Restraint of trade—Limited agency contract—Sherman anti-trust law—Effect of withholding title—No violation of law where agent has right only to solicit purchasers.

The Ford Motor Company in its limited-agency contract withholds to itself the title in the machine, and the agent has the right only to solicit purchasers, and no right to give complete title to the purchaser except by bill of sale signed by the Ford Motor Company, and its sales are made through its own agents under the contract, and it is protected in so directly selling by its patents, and its contract is not monopolistic, in restraint of trade, or in violation of the Sherman anti-trust law, or against public policy.

(Decided January 24, 1917.)

ERROR: Court of Appeals for Adams county.

The parties stand in this court as they stood in the court below. The plaintiff filed his amended petition in the court of common pleas alleging that on the 3d day of October, 1913, and for a long time prior thereto, the Ford Motor Company, a corporation duly incorporated under the laws of the state of Michigan, and having its place of business in the city of Detroit, in the state of Michigan, was engaged in the manufacture and sale of a certain line of automobiles, and accessories thereto, known as the Ford automobile, of which it was the sole manufacturer; that the automobiles and accessories were manufactured under letters patent of the United States, of which the Ford Motor Company was the sole and exclusive owner; that on said third day of October, 1913, the plain-

tiff made application to the said Ford Motor Company to be its agent in the following territory, viz., Winchester, Ohio, and Adams county, all in the state of Ohio; and that said Ford Motor Company accepted said application and entered into a written contract.

A copy of the contract is incorporated in the petition.

On the 9th day of March, 1914, the plaintiff and defendant, having full notice and knowledge of the existence, terms, provisions and conditions of said contract of plaintiff with the Ford Motor Company, entered into a partnership in the business of selling automobiles. The partnership took over and assumed all the rights, powers and privileges contained in the contract between plaintiff and the Ford Motor Company. Prior to said 9th day of March, 1914, plaintiff and defendant, as such partners, ordered and requested a consignment to plaintiff from said Ford Motor Company, under said contract between plaintiff and said Ford Motor Company, of a large number of said Ford automobiles, to be sold under the provisions of said contract, plaintiff and defendant, as such partners, advancing to said Ford Motor Company eighty-five per cent. of the full advertised list price of the consignment. The cars so ordered were duly shipped by the Ford Motor Company.

On the 9th day of March, 1914, while plaintiff and defendant, as such partners, had in their possession a large number of such cars belonging to said Ford Motor Company, they dissolved said partnership and entered into a contract of dissolution. Parts of said contract are as follows:

"W. C. Neu is to have as his share in the division of the property eleven new motor cars in good condition; Orebaugh is to have all the balance of the machines * * *.

"The said W. C. Neu is to sell all his cars in accordance with the terms of the contract between the Ford Motor Company and W. H. Orebaugh and the said W. H. Orebaugh agrees to sell on the same conditions, and neither of them is to interfere with the other's sales."

Plaintiff says that the defendant, in violation of said written agreement of defendant with plaintiff, and with full knowledge of said contract between plaintiff and the Ford Motor Company, between the 9th day of March, 1914, and the 30th day of September, 1914, and while both contracts were in full force and effect, which defendant well knew, sold a large number of said Ford motor cars so received by defendant under his written agreement with plaintiff, to-wit, six of said new Ford motor cars, outside of the specified territory mentioned in said contract of limited agency between this plaintiff and the said Ford Motor Company, knowingly selling the same to persons who are, and then were, residents of Scioto county, Ohio. Thereupon said Ford Motor Company, through one W. J. Friel, its limited agent in said Scioto county, called upon the plaintiff, and plaintiff under his said contract with the said Ford Motor Company was compelled to and did pay at the order of the Ford Motor Company to its limited agent at Portsmouth, Ohio, the sum of \$400 damages, by reason of such sales so made by defendant in

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violation of said contract between plaintiff and defendant.

Plaintiff therefore claims a judgment against the defendant for the sum of \$400.

To this amended petition the defendant filed a general demurrer on the ground of insufficiency.

The demurrer was sustained in the court of common pleas.

Messrs. Blair & Kimble, for plaintiff in error.

Mr. Joseph W. Bagby and *Mr. C. E. Roebuck*, for defendant in error.

WALTERS, J. The question raised is whether or not the contract between Orebaugh and the Ford Motor Company is against public policy, monopolistic in its tendencies, and in violation of the Sherman anti-trust law.

The former contract of the Ford Motor Company was under consideration by the district court of the United States for the southern district of Ohio, western division, in cause No. 2174, *Ford Motor Company v. The Union Motor Sales Company et al.*,* and Judge Hollister held in the opinion that the contract of the Ford Motor Company then existing and under consideration by the court was monopolistic, against public policy, and came within the provisions of the Sherman anti-trust law.

Whether or not the contract now under consideration, or the contract under consideration by Judge Hollister, is a contract which the Ford Motor

* 225 Fed. Rep., 373. — REPORTER.

Company had a right to make with its agents depends upon whether or not the contract provides for the sale of the machines to the agents—whether or not the title to the machines vests in the agent.

After the above decision the attorneys for the Ford Motor Company drew up another contract, which they attempted to take out of the provisions of the decision of Judge Hollister. As to whether or not they have done so is the principal question in this case.

Judge Hollister held that a patentee, when he sold his machines to a vendee and received the full purchase price therefor as such patentee and manufacturer, could not dictate the price at which his agent or vendee should sell the article; that under the patent laws of the United States when a man receives a patent, the object is to give him a monopoly, he may manufacture and sell direct for such price as he may fix, and is protected by the law and his patents, but that when he sells to an agent or other person and receives the full price he asks for the article and all he expects to receive, he can not say to the vendee or agent that he must sell it for a certain price. That is the limit of the protection afforded him by the patent laws of the United States.

Mr. Orebaugh's contract was under the new form of contract provided by the Ford Motor Company, and if its terms withhold the title in the Ford Motor Company, and the agent has the right only to solicit purchasers for the Ford Motor Company and has no right to give complete title to the purchaser except by bill of sale signed by the Ford

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Motor Company, it seems to us the Ford Motor Company is selling the machine direct through its agent, that Orebaugh was simply a soliciting agent for the Ford Motor Company, and that no title passed when Orebaugh secured a purchaser for one of the machines, until the Ford Motor Company executed a bill of sale.

Let us examine some of the provisions of this new contract.

The preamble states: "Whereas the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and the first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:" etc.

Condition No. 1 recites: "That first party hereby appoints the second party its 'Limited Agent', with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's products to users only in the methods and upon the terms and within the territory herein specifically set forth."

Condition No. 2 is as follows: "That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred."

Condition No. 3 is as follows: "That first party will consign its Ford automobiles to second party to be sold to users only, and not for re-sale upon bills of sale to be executed by the first party only, as hereinafter provided."

Condition No. 6 states: "Second party shall arrange for sales of Ford automobiles * * *."

And in condition No. 7 we find the term: "Second party shall arrange all sales * * *."

Condition No. 9 provides: "The first party may change the list price of any of its products at any time it may choose * * *."

Condition No. 10 sets forth the second party's lien, stating that he shall advance in cash 85 per cent. of the full list price of cars at the time of the consignment; and in condition No. 11 the word "consignment" is also used.

Condition No. 13 is as follows: "First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, or one of its factory branch managers, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever."

Condition No. 14 specifically gives the second party a lien on each Ford automobile consigned to him, for the 85 per cent. advanced by him on the sale.

The consignee or limited agent could have no lien upon his own property.

Condition No. 15 states: "Second party will make no arrangements for the sale of a Ford automobile without taking such written signed order * * *."

Condition No. 17 is as follows: "The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, * * *."

Condition No. 19 states: "Second party shall have no authority to make any warranty whatsoever of Ford automobiles * * *."

Warranty is an incident of ownership.

Condition No. 21 provides: "In case of damages to automobiles by carriers in transit to second party collection from the carrier shall be made in the name of the first party as the owner of such automobiles * * *."

In condition No. 23 second party guarantees to save first party harmless from theft and damage of any kind to Ford automobiles while in his possession under consignment.

In condition No. 25 second party agrees to display signs and otherwise advertise as a limited agent for Ford cars, and thus establish himself with the public as being simply an intermediate agent between the seller and buyer, or, in other words, a means of communication.

Condition No. 32 is as follows: "The first party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay to the second party five per cent (5%) of the list price of the automobile or automobiles so sold, after it shall have received the full purchase price in cash. This shall not include sales of parts or accessories, which are otherwise provided for herein."

Condition No. 43 again reserves the right in the first party to change the price of the car at any time, and even after requisitions and deposits are accepted.

All of these provisions, and each and every one of them, are made in this contract with the intent on the part of the contracting parties that the first party shall retain the title and ownership of all automobiles until the limited agent has secured a purchaser, and, then, not until the first party executes a bill of sale to the purchaser is the sale complete.

The first party reserves to itself the right to make sales in the territory, and provides that the second party shall not warrant any of the automobiles. If he owned them he could do as he pleased with them. The second party can make all the arrangements he pleases for a sale, but, in the contract, the Ford Motor Company reserves the right to make the sale by executing a bill of sale. The contract speaks of the second party making arrangements for the sale. Condition No. 13 provides that the Ford Motor Company "shall retain all and complete title to each automobile until actual bill of sale [is] signed and executed by first party * * *." Condition No. 9 gives the right to the first party to change the list price of any of the products. That is an index of ownership.

We do not decide whether the relation between the automobile company and the limited agent is that of bailor or bailee. But whatever the relation is, as evidenced by this contract, it may be

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termed, as it is in the contract, one of limited agency.

We are constrained to believe that what we have quoted of this new contract steers clear of the objections in the old contract pointed out in the opinion of Judge Hollister, as each of the paragraphs quoted from the new contract shows distinctly that the Ford Motor Company has simply given the right to its limited agents to procure purchasers; in other words, as is said in the contract, to arrange for the sale. The company really makes the sale itself after the agent acts as a solicitor in procuring a purchaser. The Ford Motor Company manufactures these automobiles under its different patents issued by the United States, and under this contract it sells them directly through an agent. That it has a right to do, and is protected by its patents in fixing whatever price it chooses so long as the title is not vested in the limited agent.

Having concluded the main issue in this case, and having found that the contract is a valid one, is not against public policy, is not monopolistic, and is not within the provisions of the Sherman anti-trust law, and that the patentee of these articles was discharging only his own legal rights protected by the patents, we now come to the question of the liability of the defendant to plaintiff under the contract of dissolution between them.

It is stated in the amended petition, and in the language used in the contract of dissolution, that Neu had explicit knowledge of all the clauses in the contract of Orebaugh with the Ford Motor Company, and that he agreed in the contract of dissolu-

tion that he would sell all cars in accordance with the terms of the contract between the Ford Motor Company and W. H. Orebaugh. Now neither Orebaugh nor his partner, according to our finding, had any title to any of the cars. Therefore, Orebaugh could confer no title by selling the cars to Neu, and in fact there was not a sale — there was a dissolution of the partnership and a division of the assets of the partnership between them upon amicable terms. But Neu, in violation of his contract of dissolution and in violation of the Ford Motor Company contract, of which he knew, as is alleged in the amended petition, sold machines in Scioto county, which he well knew he had no right to do, and he knew at the time that selling machines outside of the territory limited in the Ford Motor Company contract would make Orebaugh liable for \$250 for each machine so sold. Orebaugh says he has paid the damages to the agent of Scioto county, through the Ford Motor Company, and he now asks that Neu, for a flagrant violation of his contract, pay to him the damages he has sustained thereby. If this was not fraud on the part of Neu, when he had knowledge of the Ford Motor Company's contract, and its provisions against selling outside of certain territory, and the penalty attached to Orebaugh for so doing, it certainly nearly amounts to fraud. For such a violation of the terms of the partnership contract of dissolution and the Ford Motor Company's contract, knowing of the damage that would result to Orebaugh, it seems to us that Orebaugh can maintain an action against Neu.

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The judgment of the court below is reversed, cause remanded, and the court instructed to overrule the demurrer to the amended petition.

Judgment reversed, and cause remanded.

SAYRE and MIDDLETON, JJ., concur.

FISHER v. WHITTUS ET AL.

Schools—Consolidation—Jurisdiction—County boards of education over village school districts—Section 4684 et seq., General Code.

A county board of education has authority to dissolve two village school districts and consolidate them into one, in the absence of procedure on the part of said districts under Sections 4688 and 4688-1, General Code, which would exempt them from such action.

(Decided April 28, 1917.)

ERROR: Court of Appeals for Fairfield county.

Mr. M. A. Daugherty and Mr. B. E. Shell, for plaintiff in error.

Mr. James M. Butler and Mr. J. H. Fultz, prosecuting attorney, for defendants in error.

HOUCK, J. The plaintiff, Dillon Fisher, is an elector and taxpayer, and the father of children of school age, who reside with him in the Basil village school district of Fairfield county, Ohio.

The defendants are the members of the board of education of the Liberty union village school

district of said county, the county board of education of Fairfield county, Ohio, and C. C. Miller, as clerk of the said county board of education.

The amended petition of the plaintiff seeks to enjoin the defendants from taking any steps or doing any act toward the abolishment of two village school districts, known as the Basil village school district and the Baltimore village school district, and from selling certain bonds and doing certain other things in the way of creating these two districts into a new one to be known as the Liberty union village school district.

These villages and school districts adjoin each other.

In February, 1916, the county board of education of Fairfield county united these two village school districts into one new district, appointed a provisional board of education for same, and authorized the issuance of \$60,000 of bonds to purchase a site and erect a new school building thereon.

The petition seeks to restrain the issuance of these bonds, the purchase of the school site and the erection of the building, and to prevent the consolidation of these two village districts into a new one.

A general demurrer was filed to the amended petition in the court below, and was sustained, and error is here prosecuted seeking a reversal of the judgment of the common pleas court.

Plaintiff in error relies upon the claim that the county board of education was wholly without authority or power, statutory or otherwise, to create a new school district out of the two village districts. In other words, learned counsel for the

plaintiff in error contend that a county board of education has no jurisdiction to dissolve village districts and create a new district therefrom.

Section 4684, General Code, clearly defines what constitutes a county school district:

"Each county, exclusive of the territory embraced in any city school district and the territory in any village school district exempted from the supervision of the county board of education by the provisions of sections 4688 and 4688-1, and territory detached for school purposes, and including the territory attached to it for school purposes, shall constitute a county school district. In each case where any village or rural school district is situated in more than one county such district shall become a part of the county school district in which the greatest part of the territory of such village or rural district is situated."

We find no allegation in the amended petition that would warrant us in holding that the two village districts in question are within the exceptions found in the above statute; but we do find that they are not within the exceptions.

Therefore, if they are not exempted from the provisions of Section 4684, General Code, as provided in Sections 4688 and 4688-1, General Code, then they are under the jurisdiction and authority of the county board of education as contemplated in and provided by Section 4684, General Code, and the county board of education has full and complete power and authority to create a new district from the territory embraced in them.

No claim is made in the amended petition that advantage was taken by the electors of the new

school district of the provisions of Section 4736, General Code, part of which reads, "Which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed."

From a careful examination of Section 4736, General Code, which further provides, "The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof," we are fully convinced that the county board of education has full power and authority over village districts and may create a new district by consolidating two village districts.

This language is clear, plain and explicit and certainly gives to the county board full and complete power in the premises; unless the village district or districts are exempted from the jurisdiction of the county board of education as provided in Sections 4688 and 4688-1, General Code, which does not appear in the immediate case.

Section 4679, General Code, reads as follows:

"The school districts of the state shall be styled, respectively, city school districts, village school districts, rural school districts and county school districts."

Thus it will be seen that we have four kinds of school districts: city, village, rural and county.

The statute, Section 4684, General Code, specifically exempts city districts from the jurisdiction of a county board of education, but gives it com-

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plete authority over rural and village districts, unless village districts take advantage of the provisions of Sections 4688 and 4688-1, General Code, and thereby become exempt from such jurisdiction.

We hold that a fair interpretation of the provisions of the new school code, and the legislative intent, which must be ascertained from the language used in the code, can lead to but one conclusion as to the jurisdiction of a county board of education over village districts, and that is, that it has such jurisdiction unless they become exempt therefrom in the way provided by said law.

In passing upon the question raised by the demurrer to the amended petition we have put aside any technical points that might be urged and have looked wholly and entirely to the real question involved, and the one urged and relied upon by counsel for plaintiff in error, namely: Has a county board of education jurisdiction to dissolve two village districts, which have not become exempt as provided by Sections 4688 and 4688-1, General Code, and to create a new district from the territory embraced therein?

We must and do answer this inquiry in the affirmative.

Thus holding, we find that the common pleas court was not in error when it sustained the demurrer to the amended petition in this case; and finding no prejudicial error in the record the judgment of the common pleas court must be affirmed.

Judgment affirmed.

POWELL and SHIELDS, JJ., concur.

THOMPSON ET AL. v. THE CITY OF CINCINNATI
ET AL.

Sidewalks—Power of city council—Necessity for improvement or repair—Arbitrary action by city council—Power of court of equity to intervene.

The power to determine when it is necessary to improve or repair a sidewalk is vested in the council of a city, but this power cannot be exercised in an arbitrary manner regardless of the public necessity or the rights of the property owners. A court of equity will intervene to prevent arbitrary action amounting to a manifest abuse of discretion.

(Decided April 5, 1915.)

APPEAL: Court of Appeals for Hamilton county.

Mr. W. W. Clippinger, for plaintiff.

Mr. W. M. Schoenle, city solicitor, and *Mr. Saul Zielonka*, assistant city solicitor, for defendant.

JONES, OLIVER B., J. The law announced by this court in *Livingston v. City of Cincinnati*, 4 Ohio App., 338, is applicable to this case. The power to determine when it is necessary to improve or repair a sidewalk is vested in the council of the city. But this power cannot be exercised in an arbitrary manner, regardless of the public necessity or the rights of the property owners. A court of equity will only intervene to prevent such arbitrary action amounting to a manifest abuse of discretion.

The evidence shows that the brick sidewalk described in the petition, having a frontage of 250 feet on the north side of Eighth street, between

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Depot street and State avenue, is out of repair in the following particulars: that, commencing 18 or 19 feet from the west end, and running 20 feet or more in length in front of the property described as a carpenter shop, it is in bad condition, the bricks being entirely missing one-third of the width of the sidewalk, and the other two-thirds of the width being of a rough and uneven surface containing a two-inch depression and projecting bricks, which portion should be replaced with a new sidewalk; that the center of the sidewalk just east of this front for a distance of about 40 feet is rough, which should be so relaid as to be smooth and even; and that four certain depressions or valleys are shown, varying from one to two and a half inches deep, extending from the curb eight to ten feet across the sidewalk, at stop-boxes, being evidently where trenches have been dug for water or gas service pipes which have not been properly filled and tamped when repaved, which depressions should be filled and repaved. Other slight defects are indicated by the evidence, especially the evidence of City Sidewalk Engineer Barr and by the plan or blueprint submitted. With the exception of the sidewalk in front of the carpenter shop above referred to, where a new sidewalk should be constructed, the remainder of the sidewalk is in good condition, favorably corresponding with the brick sidewalks laid in that portion of the city, and answering all the needs of public travel. The defects above pointed out are of minor importance and can all be remedied by comparatively inexpensive repairs, which should be made by the property owner under the supervision of the city.

Plaintiffs should be permitted to repair all of that part of the sidewalk except that portion lying in front of the carpenter shop, where a new sidewalk should be built. Under the circumstances shown, the court find that it would be an abuse of discretion for the city to require the destruction of the entire brick sidewalk and its replacement by a cement sidewalk at the cost of the property owners.

Attention is called by the city in its evidence to the fact that certain stop-boxes situated in this sidewalk near the curb are above the grade and the surface of the sidewalk, and that several drains from the yard empty upon the surface of the sidewalk. Neither of these complaints would be rectified by changing the sidewalk from brick to cement. If they are contrary to the legal requirements of the city, proper steps may be taken for their correction, but they are not involved in the sidewalk order here under consideration.

An injunction will be granted as above indicated.

Injunction allowed.

JONES, E. H., and GORMAN, JJ., concur.

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Helmert et al. v. McCarthy et al.

HELMERS ET AL., PARTNERS, v. MCCARTHY ET AL.,
BOARD OF DISTRICT ASSESSORS, ET AL.

Equity—Injunction—Taxation—Board of complaints—Notice by publication—Relief from alleged illegal and unjust taxation values—Necessity for exhausting legal remedies before resorting to equity.

1. A party seeking relief from an alleged illegal and unjust taxation value must first exhaust all his legal remedies before resorting to a court of equity; and where the law provides the tribunal to which he can appeal for relief, such as a board of complaints, state tax commission or board of revision, he must avail himself of such opportunity before he can be heard in a court of equity.
2. Publication in a newspaper, as provided by law, of the fact that the taxing authorities had finished their work and that the same was open for inspection and objection is sufficient to charge a taxpayer with notice of the action of the assessors.
3. The fact that a board of complaints had more work than it could and did perform does not relieve a taxpayer from the duty of first filing complaint with such board.
4. Before one can be entitled to invoke the aid of a court of equity by the extraordinary remedy of injunction, something more than an irregularity, or illegality in procedure, or arbitrary official action, must be shown. There must be a wrong, an injustice or an irreparable injury for which the law provides no adequate remedy; otherwise no relief can be granted.

(Decided January 29, 1917.)

APPEAL: Court of Appeals for Hamilton county.

Mr. Otto Pfleger and Messrs. Renner & Renner.
for plaintiffs.

*Messrs. Campbell, Hickenlooper, Hauck & Cappel-
pelle,* for defendants.

JONES, E. H., P. J. After a careful consideration we have reached the conclusion that the principles of law announced in the case of *Mills, Trustee, v. Bd. of Equalization of Cincinnati*, 1 C. S. C. R., 566, and in the case of *The Wheeling Electric Co. v. Tax Commission of Ohio*, decided by Judge Sater of the U. S. district court for the southern district of Ohio, are controlling in this case. The opinion in the latter case has not yet been reported, so far as we know, but a copy of same is attached to the brief filed by counsel for defendants herein.

In the cases above cited it was held that a party seeking relief from an alleged illegal and unjust taxation value must first exhaust all his legal remedies before resorting to a court of equity; and that where the law provides the tribunal to which he can appeal for relief, such as a board of complaints, state tax commission or board of revision, he must avail himself of such opportunity before he can be heard in a court of equity.

It is admitted in this case that no appeal from the alleged unjust increase in their tax valuation was taken by the plaintiffs to the board of complaints. As an excuse for this they say: first, that they had no notice of the increase until they received their tax bill, which was some time after the board of complaints had finished its work and adjourned; and, second, that if they had made a complaint or filed an appeal with the board of complaints it would not have been heard for the reason that the said board adjourned with a great many complaints on file untried and undisposed of. Neither of these excuses is valid. The firm had

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the only notice which the law provides for, namely, the publication in a newspaper of the fact that the tax commission had finished its work and that the same was open for inspection and objection. The evidence shows that these notices were published in accordance with the law, and it follows that the plaintiffs had constructive notice of the action of the assessors. In the second place, the fact that the board of complaints had more work than it could and did perform does not relieve the plaintiffs from the duty of first filing their complaint with it. Had they done so, and a hearing for any reason had been denied them, it might well be claimed that they would have some standing in this court.

On the authorities above cited, which are only reaffirmations of the well-established general rule that a resort to a court of equity can only be had where there is no adequate remedy at law, we hold that the plaintiffs' petition should be dismissed and the relief therein prayed for be denied.

We are constrained to add that regardless of the above barrier, technical as it may appear, the plaintiffs would not be entitled to the relief sought even though their petition were entertained. The employe who made the tax return did not appear as a witness in the case. The chief witness for the plaintiffs upon the question of values was a member of the firm, who testified that the machines, the value of which was the subject of this action, were carried upon their books at a value of three times that at which they were returned by them for taxation. In the light of this and other evidence in the case, we are satisfied that

the value fixed on these machines by the district assessors was fair and reasonable; and therefore the plaintiffs must be considered as coming for relief to a court of equity while themselves unwilling to do equity by contributing their fair proportion of taxes to the public treasury.

Under this evidence, there being no wrong to make right, there would be no room for the intervention of a court of equity.

"It by no means follows, however, that the plaintiffs are entitled to an unconditioned injunction against the collection of the tax. They ask equity, and must do equity. They invoke the exercise of an extraordinary power of the court for their relief, and the court in its discretion should refuse that relief, except upon conditions that are equitable and just. We think, therefore, that the injunction should only be granted upon the condition that the plaintiffs, or their bank, shall first pay to the treasurer of Hamilton county, a sum that will be a *pro rata* equivalent for the tax imposed upon the state and independent banks, under the act of 1861 — that is to say, such sum as might lawfully have been assessed upon the plaintiffs, or their bank, under said act, had it been one of said state banks. If the parties cannot agree upon this sum, proceedings can be adopted to ascertain it by the court; and, if found necessary, the bank itself can be made a party." *Frazer et al. v. Sieborn, Auditor, et al.*, 16 Ohio St., 614, at page 624.

Courts of equity look through the form into the substance of things. Before one can be entitled to invoke their aid by the extraordinary remedy of injunction, something more than an

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irregularity, or illegality in procedure, or arbitrary official action, must be shown. There must be a wrong, an injustice or an irreparable injury for which the law provides no adequate remedy; otherwise no relief can be granted.

The petition of plaintiffs will be dismissed at their costs.

Petition dismissed.

JONES, OLIVER B., and GORMAN, JJ., concur.

ANDREWS ET AL. v. BEIGEL, RECEIVER, ET AL.

Receivers—Liability for rental of real estate—Used by receiver under order of court—Real estate held under lease before appointment of receiver.

1. Where real estate is occupied and used by a receiver in the operation of a business under the direction of the court, the rental or compensation for the use of the property becomes an expense incident to the administration of the receivership, and, like other costs, is to be paid before the assets of the debtor are distributed among the creditors.
2. Where before the appointment of a receiver property has been held under lease, and the receiver takes possession, he will be given a reasonable time to determine whether he will accept under the lease or not. If he does so accept, he will be bound by the terms of the lease. If he does not accept under the lease and no other terms are made with the landlord, he will be required to pay for the time he occupies the premises a reasonable compensation not less than the rate of rental stipulated in the lease.

(Decided November 22, 1915.)

ERROR: Court of Appeals for Hamilton county.

Messrs. DeCamp & Sutphin and Mr. Greg. B. Moorman, for plaintiff in error.

Messrs. Kramer & Bettman, for defendant in error Burger.

Messrs. Renner & Renner and Mr. Otto Pfleger, for defendant in error Beigel, receiver.

JONES, OLIVER B., J. The question in this case grows out of a receivership of The J. Walker Brewing Company, in which the receiver of the brewing company carried on the business under order of the court for a period of two years. The business was carried on by receiver with a view to selling the property and business of the company as an entirety. Efforts were made by the receiver and his counsel to make such sale, at private sale, and, these failing, it was offered at public auction as an entirety, and failed to sell. Afterwards the brewery was dismantled. The leasehold was sold separately, and the other property sold in parcels and thus disposed of.

The result of the management of the business by a receiver was most unfortunate. Money was borrowed for the purpose of paying for merchandise, labor and expenses of running the business, and after the property had been sold it developed there were not sufficient funds on hand to pay all the obligations of the receiver.

The question submitted in this case is as to the payment of rentals for the property occupied by the brewery and used by the receiver in the conduct of the business. This question arises upon an intervening petition filed by Charles Andrews and the

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representatives of the estate of Peter Andrews, deceased, and of the estate of Conrad Schultz, deceased, said three parties owning respectively 19/60, 36/60 and 5/60 of the property so used.

This property was held by the brewing company under a lease from said parties at a rental of \$3600 per annum, payable at the rate of \$300 per month. The receiver was appointed August 30, 1910, and the court by its receiver then took possession of all said leased property and ordered its receiver to continue the business of the brewing company, all of said property being essential to the conduct of said business.

The two proceedings in which a receiver was asked have been consolidated in this case.

On December 10, 1910, a petition was filed by the receiver praying for instructions in regard to the payment of rentals for said property. On December 24, 1910, the court made an order finding said property under lease to the brewing company from the above-named lessors at a rental of \$3600 per annum, and ordered the receiver to pay all rents accruing from the date of his appointment, being at the rate of \$300 per month.

On June 17, 1911, an intervening petition was filed by said lessors setting out their claim for back rental and praying for an order for its payment prior to any other claim; that the lien for said rental might be established and declared; that the receiver might be required by the court to elect and determine whether he would accept the leasehold estate and assume the obligations thereof including said rental, and in the event that said receiver should determine not to assume said lease that said

lessors might be allowed to forfeit said leasehold estate or foreclose the lien thereon, or take other proceedings to enforce and protect their rights in said property; and that said receiver be required to pay the past due rentals as a condition for continuing in the use and occupation of the premises as receiver.

After several hearings upon said intervening petition an order was made by the court December 18, 1911, finding that there was due for back rentals under said lease, which had accrued prior to the appointment of said receiver, the amount of \$5736.42, and the receiver was ordered to pay to said lessors or their attorneys one-fourth of said amount, being \$1434.11; and the time of the payment of the balance of said claim and the consideration of all other matters set forth in said intervening petition was postponed for further consideration of the court. And for the purpose of making said payment of \$1434.11 the receiver was authorized to borrow such sum, if necessary so to do, and to issue a receiver's certificate therefor, which should be the first lien upon the property and estates of said The J. Walker Brewing Company.

On April 6, 1912, an order was made to sell the brewery as a going concern, including said leasehold; and on the same day an order was made providing that if such sale as an entirety was made that the lien to secure all rentals due under said lease up to the day of sale of said leasehold should be transferred to the purchase money derived from the sale of said company's estates, and the lien asserted by said lessors should be transferred, in the event of such sale, to the proceeds of said sale

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as the first and best lien thereon and should be paid out of said purchase price prior and preferably to all other claims.

The property was offered as an entirety under said order and failed to sell, and an order was made on May 7, 1912, providing for the sale of said property in parcels if it failed to sell as an entirety; and on the 8th of May, 1912, an order was made providing that the lien reserved to the lessors to secure rentals under said lease up to the day of sale should be transferred to the proceeds of sale of said leasehold estate as the first and best lien thereon, and said rentals should be paid out of the purchase price of said leasehold estate prior and preferably to all other claims. Upon said sale the leasehold sold for the sum of \$1,000, and the court afterwards made an order that said amount should be paid by the receiver to said lessors and credited upon the amount due for rentals.

On November 23, 1912, another intervening petition was filed by said lessors, Charles Andrews and the representatives of said two estates, setting out the proceedings above detailed and stating that no money had been paid on account of the sum of \$1434.11 ordered paid by the receiver to them under the order of court made December 18, 1911, and setting out the amount of unpaid rental due them from the receiver accruing after his appointment amounting to \$2115, and stating that the sum of \$1000, the proceeds of the sale of said leasehold ordered paid to them October 29, 1912, had been credited by them upon the rental due prior to said receivership, leaving a balance due of said rentals of \$4736.42, with interest for the amount due prior

to the receivership, and \$2115 rental accruing under the receivership, and praying that the same be established as a first and prior lien upon the proceeds of sale prior to the claims of the receiver's certificates issued in said proceeding, and to the claim of the Fifth-Third National Bank for moneys advanced to said receiver, and prior to the claims of all creditors.

The right of such priority was contested by answer and cross-petition filed by Wm. Ammann and The Burger Brothers Company, who were creditors for malt sold to said receiver, and also by answer of the receiver. Issue was made by reply of said intervenors, and evidence was taken, and a hearing had thereon, all of which is set out in the bill of exceptions.

Where real estate is occupied and used by a receiver in the operation of a business under the direction of the court, the rental or compensation for the use of the property becomes an expense incident to the administration of the receivership, and, like other costs, is to be paid before the assets of the debtor are distributed among the creditors.

Where before the appointment of a receiver property has been held under lease, and the receiver takes possession, he will be given a reasonable time to determine whether he will accept under the lease or not. If he does so accept, he will be bound by the terms of the lease. If he does not accept under the lease and no other terms are made with the landlord, he will be required to pay for the time he occupies the premises a reasonable compensation not less than the rate of rental stipulated in the lease. The court has no power, by a

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receiver, to take possession of the property of a person without his consent and then make its own terms for compensation to be paid for its use. When a receiver takes under a lease under which arrears of rental are due, it can be made a condition by the lessor of the continued use of the property that such arrears must be assumed and paid by the receiver.

A careful consideration of the record convinces the court that it must be held that the receiver took under the terms of said lease, and that under the orders of the court as made December 24, 1910, and December 18, 1911, both the accrued rentals prior to the receivership and those unpaid accruing since the appointment of the receiver are obligations of the receiver.

The sum of \$1434.11, being one-fourth of the back rentals, which was ordered paid December 18, 1911, and for which a receiver's certificate was authorized, must be considered as a preferred claim, the order for payment by the court having been made positively, and the evidence showing that the receiver had from time to time funds in his hands sufficient to make such payment. The court in its order of December 18, 1911, allowed said back rental as an indebtedness of the receiver, instead of refusing such allowance and granting the application of lessors for the right to possession of their property or foreclosure of their lien. After the receiver had thus been enabled to continue in the possession of the property and to operate the brewery it would be unfair to the lessors to reverse this order, as was done in the final judgment of

the court below, and disallow any claim for back rent.

It appears, however, from the record, that these lessors were all stockholders in the brewing company, and, in part, its creditors; that they with all the other parties interested were under the belief that the brewing company might through its operation by the receiver of the court and a favorable sale of its property as an entirety be enabled to pay all of its obligations; and that because of this belief and the other interests of the lessors, while at no time expressly waiving any right of priority they might have for rentals, they undoubtedly did permit, with others interested, the continuation of the receivership and the accumulation of unpaid rentals to such an extent that it would be inequitable under all the circumstances to prefer them to other creditors of the receiver who had also by extending their credits permitted the continuation of the receivership.

The judgment of the court below must therefore be modified to the extent of allowing plaintiffs in error a preferred claim of \$1434.11, with interest from the date at which it was ordered paid, and requiring them to prorate as to the balance of all rentals due, both those accruing before and those accruing after the appointment of the receiver.

With such modification the judgment below will be affirmed.

Judgment modified, and affirmed as modified.

JONES, E. H., P. J., and GORMAN, J., concur.

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Louisville Brick Co. v. Calmelat.

THE LOUISVILLE BRICK & TILE CO. v.
CALMELAT ET AL.

Permanent trespass—Continuing trespass or nuisance—Statute of limitations—Right to bring separate actions.

1. Under the doctrine of permanent trespass or nuisance, for which but one action lies, and for which damages may be awarded *in solido*, when a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass.
2. When an owner of land rightly and lawfully does an act entirely on his own land, and by means of such act puts in action, or directs a force against, or upon, or that affects, another's land, without such other's consent or permission, such owner or actor is liable to such other for the damages thereby so caused the latter, and at once the cause of action accrues for such damages; and such force, if so continued, is continued by an act of such owner or actor, and may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him and is an additional cause of action; and until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action.

(Decided March 24, 1917.)

ERROR: Court of Appeals for Stark county.

Mr. A. M. McCarty and Mr. John C. Welty, for plaintiff in error.

Messrs. Hart & Koehler, for defendants in error.

POWELL, J. The parties stand in this court in the inverse order to that in which they stood in the court below, the plaintiff in error being defendant in that court, and the defendants in error,

plaintiffs. We will refer to them in this opinion in the order in which they stood in the trial court.

The plaintiffs are the owners of a tract of land described in the petition. The defendant is a manufacturer of brick, tile and other clay products. Its plant is located immediately west of the premises of plaintiffs. It owns and operates continuously sixteen tile or brick kilns, and had so owned and operated said plant for more than four years immediately preceding the commencement of this action. In the manufacture of its products it is alleged that large quantities of smoke, soot, cinders and gas constantly emanate from its kilns, and the same are cast over and upon plaintiffs' said lands, the comfort of plaintiffs interfered with, and said lands depreciated in rental value by reason thereof, to plaintiffs' damage in the sum of \$2,000, for which they ask judgment.

On the trial of the action in the court below, plaintiffs recovered judgment. Defendant seeks a reversal in this court.

The principal contention of the parties is as to the application of the statute of limitations, which is pleaded as a defense. The first kilns of the defendant were built in 1892. There were eight of them. In the year 1900 the plant was destroyed by fire. It was then rebuilt and eight more kilns added, and it has been operated continuously from 1901 until the present time with sixteen kilns. The proper judgment to be rendered depends on the character of the trespass complained of. If it is what, in law, is known as a permanent nuisance, then a cause of action

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arose in favor of plaintiffs when the first eight kilns were constructed in 1892, and any right of recovery was barred by the statute of limitations at the commencement of this action.

"When a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass." *Valley Ry. Co. v. Franz*, 43 Ohio St., 623, 625.

This is the doctrine of permanent trespass or nuisance, for which but one action lies, and for which damages may be awarded *in solido*. It is wholly an action for trespass. *Williams v. Pomeroy Coal Co.*, 37 Ohio St., 583; *P. Ballantine & Sons v. Pub. Service Corp.*, 86 N. J. L., 331, L. R. A., 1915A., 369, and *Downs v. The Greer Beatty Clay Co.*, 9 C. C., N. S., 345.

A private or continuing nuisance is defined to be:

"Anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, and not amounting to a trespass." 3 Stephen's Commentaries (1 ed.), 499, and *Goodall v. Crofton*, 33 Ohio St., 271.

"The business of burning brick is a lawful one, and whether or not it is a private nuisance depends upon the circumstances of each particular case." *Downs v. Clay Co.*, *supra*, 345.

"And when the owner of land rightly and lawfully does an act entirely on his own land, and by means of such act puts in action, or directs a force against, or upon, or that affects another's

land, without such other's consent or permission, such owner or actor is liable to such other for the damages thereby so caused the latter, and at once a cause of action accrues for such damages; and such force, if so continued, is continued by the act of such owner and actor, and it may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him and is an additional cause of action; and until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action." *Valley Ry. Co. v. Franz*, 43 Ohio St., 623, 627, and *City of Mansfield v. Hunt*, 19 C. C., 488.

There are numerous authorities in Ohio and elsewhere supporting the doctrines above laid down. The court in the instant case is required to decide which of the two kinds of action is presented by the record.

The petition alleges that the defendant, by reason of the smoke, soot, cinders and gas emitted from defendant's kilns and cast upon plaintiffs' lands, "has injured the vegetation, crops and shrubbery growing upon plaintiffs' premises" within the four years immediately preceding the commencement of the action.

It further alleges "that by reason of the soot, cinders and offensive gases so cast upon and about the premises of plaintiffs, the comfort of the plaintiffs has been interfered with, said premises rendered uncomfortable for habitation, and greatly depreciated in rental value, for said period

of four years, all to the injury and damage of the plaintiffs in the sum of two thousand dollars."

The complaint last above quoted is certainly of the character of a permanent trespass or nuisance, for which but one action for damages can be maintained, and that action is barred by the four-year statute of limitations.

The charge first above quoted for damages to "vegetation, crops and shrubbery" of plaintiffs is as plainly a continuing trespass, for which an action will lie, as the other is a permanent trespass, and upon this charge alone the court finds plaintiffs were entitled to recover in this action; and there being no other error prejudicial to the rights of the plaintiff in error complained of, or shown by the record, the court has arrived at the conclusion that said judgment should be affirmed.

Judgment affirmed.

SHIELDS and HOUCK, JJ., concur.

THE STATE, EX REL. LANDIS, v. THE BOARD OF
COMMISSIONERS OF BUTLER COUNTY ET AL.

Records of county commissioners—Technical precision not required—Courts will not interfere with legitimate discretion of commissioners—Clerk of commissioners not a county officer.

1. In construing the records of county commissioners, acting within the scope of their authority, to ascertain whether or not they have followed certain statutory requirements, technical precision will not be required. It will be sufficient if it appear, though informally, from a reasonable construction of the whole transcript of the proceedings, that these requirements have been observed.
2. It is not a proper exercise of the judicial powers of a court to interfere by injunction with the legitimate discretion of county commissioners, so long as that discretion is being honestly exercised by them in good faith within the limits of the powers conferred by statute.
3. The duties of the clerk of the county commissioners, appointed under the provisions of Section 2409, General Code, are purely clerical in their nature, and not of a character that would require independent official action such as would constitute the clerk a county officer under the provisions of the Constitution of Ohio.

(Decided March 13, 1916.)

APPEAL: Court of Appeals for Butler county.

Messrs. Andrews & Andrews, for plaintiff.

Mr. Ben. A. Bickley, prosecuting attorney. and
Mr. W. C. Shepherd, for defendants.

JONES, OLIVER B., J. This is a taxpayer's suit to enjoin the board of county commissioners from employing William W. Crawford as clerk of such board, and from the payment of any money to him for salary under such employment, and to order the return and restoration to the auditor's office of the

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books and records of the board of county commissioners.

The relator, Samuel C. Landis, states in his supplemental petition and the amendment thereto the following reasons why such employment and expenditure of money would be unlawful:

"1. That it is not necessary for the clerk of said board to devote his entire time to the discharge of the duties of such position.

"2. That said board of county commissioners did not by said resolution resolve that it was necessary for the clerk to devote his entire time to the discharge of the duties of such position.

"3. It does not require more than a few hours per week to perform the duties as clerk of said board.

"4. To carry out said contract would require the expenditure of \$1500 per annum of the public money for services which can be easily performed by the auditor of said county without any cost to the county.

"5. That said services as clerk of said board have always heretofore for many years been performed by the auditor of said county without any cost to the county, and there is no reason why the same cannot hereafter be so performed.

"6. Said board of county commissioners did not investigate the facts, and did not sit as a board of inquiry on the facts and on the necessity for the employment of said clerk.

"7. Said board of county commissioners did not find it was necessary for the employment of such clerk, and made no finding whatever on the subject.

"8. That said board of county commissioners did not find that it was necessary for the clerk to devote his entire time to the duties of his position.

"That the statute under which said commissioners made such appointment of said clerk is unconstitutional."

Provision is made in Section 2566, General Code, that the county auditor shall be the secretary of the county commissioners. Said section is as follows:

"By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law. When so requested, he shall aid them in the performance of their duties. He shall keep an accurate record of their proceedings, and carefully preserve all documents, books, records, maps and papers required to be deposited and kept in his office."

This same section was formerly Section 10 of the act prescribing the duties of county auditors, passed April 4, 1859 (56 O. L., 128; 1 S. & C., 97). In this original form it reads as follows:

"The county auditor shall by virtue of his office, be clerk to the board of county commissioners of his county, and shall keep an accurate record of their corporate proceedings, and shall carefully preserve all the documents, books, records, maps, and other papers, required to be deposited or kept in his office."

Authority is given the commissioners to appoint a clerk under Section 2409, General Code, which is as follows:

"If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties

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of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

Certain duties are prescribed by statute for the clerk, some of them being set out in Sections 2406, 2407, 2522 and 2531, General Code.

The resolution under which the employment objected to was made was adopted by the board of county commissioners at its meeting September 20, 1915, by a vote of two yeas and one no. The vote not being unanimous, under the provision of Section 2414, General Code, the resolution was again voted on at the meeting of October 16, 1915, at which time the following resolution was adopted by the yeas and nays of each of the three commissioners:

"Resolved, by the Board of County Commissioners of Butler County, Ohio, That the resolution adopted by this Board September 20, 1915, be amended to read as follows:

"That, Whereas, The Board of County Commissioners of Butler County, Ohio, deems it necessary to have a clerk who can devote his entire time to the discharge of the duties of such position,

"Therefore, Be it Resolved, by the Board of County Commissioners of Butler County, Ohio, that commencing October 18, 1915, W. W. Crawford be and is hereby employed as clerk of this Board at a salary of \$125 per month, payable monthly. Such clerk shall perform the duties required by law and the Board."

It is contended by relator that the board of county commissioners did not by this resolution, or

by any other action, find that it was necessary for the clerk to devote his entire time to the discharge of such position, and counsel argue that without such finding no power exists under the law for the appointment of a clerk.

The criticism made by counsel for relator is well taken in that the language employed in the preamble of the resolution as passed is not in its effect the same as the finding required under Section 2409 before an appointment of clerk can be made. In other words, it is not the same "to have a clerk who can devote his entire time" as it is "for the clerk to devote his entire time."

It is further insisted by counsel that the record itself must show that the board upon full consideration, and possibly on hearing evidence, or at least after considerable experience had by each member in the performance of his official duty, must make an official finding of the necessity for the clerk to devote his entire time to the discharge of the duties of the position before any appointment can be made.

It is insisted that the word "finds" has a technical meaning which requires personal experience, or something equivalent to the hearing of evidence and a judicial consideration of the necessity, and the arrival at a judgment or judicial decision in the matter; and that the word "deems," which is used in the commissioners' resolution and found in Sections 2410, 2411 and 2412, means something different from the word "finds" as used in Section 2409. Counsel have submitted dictionary definitions of these two words, one of the definitions given for "deem" being "to hold in * * * opinion; decide as a conclusion; consider, regard,

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believe;" among those for "find," "to discover through the perceptions or feelings; learn by experience; perceive; ascertain. To decide after judicial investigation." It will be seen, therefore, that there is no substantial difference in the meaning of the two terms as used in the section referred to, and that what was necessary for the board of commissioners, in order to act under Section 2409, was to become convinced after proper inquiry and consideration in good faith that the necessity existed for the employment of such clerk.

The rule for the construction of the records of inferior tribunals such as county commissioners has been laid down in the first paragraph of the syllabus of *Lewis et al. v. Laylin et al.*, 46 Ohio St., 663, as follows:

"In construing the records of inferior tribunals, acting within the scope of their authority, to ascertain whether or not they have followed certain statutory requirements, technical precision will not be required; it will be sufficient if it appear, though informally, from a reasonable construction of the whole transcript of the proceedings, that these requisites have been observed."

With this rule in mind, a fair construction of the resolution as adopted, taken in connection with the evidence set out in the record, convinces the court that the members of the board of commissioners did fairly consider the necessity for a clerk to devote his entire time to the discharge of the duties of the position, and that their intention in the passage of the resolution was to record such finding. There is evidence to show that one member of the board had served in that capacity at least

one year, and the other two members had by personal inquiry and observation informed themselves in regard to their duties in this matter. There seems to be no more reason why members should be required to have months of experience, to pass upon a question such as this, than that similar experience should be required to exercise other official duties devolving upon them.

The evidence shows that there is, as might be supposed, a difference of opinion as to the necessity and wisdom of the employment of such a clerk. It discloses, however, that there is sufficient work to occupy the entire time of a clerk for the benefit of the county, whether that clerk be one employed directly by the board, or the county auditor in person, or one of his deputies; and, while the auditor himself would receive no additional compensation by reason of his duties as such clerk, if he performed that service, it is shown by the evidence that in practice it has been customary while he was the secretary of the board for the actual work to be done by one or more of his deputies, so that in any event the cost of the work would be paid from the public treasury.

In this case there is no charge made of fraud or bad faith upon the part of the commissioners. The most that can be claimed for the petition is a charge of abuse of discretion or mistaken judgment on their part. Relator practically asks the court to substitute its judgment and official discretion, as to the necessity for this employment and expenditure, for that of the commissioners.

No matter what the personal view of the judges composing this court might be, it would not be a

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proper exercise of the judicial powers of the court to interfere by injunction with the legitimate discretion of the county commissioners so long as that discretion is being honestly exercised by them in good faith within the limits of the powers conferred by statute. Mechem on Public Officers, Sections 990, 991.

No such abuse of discretion or lack of good faith appears in the record as would require interference by the court.

It is contended, however, that Section 2409, General Code, is unconstitutional, inasmuch as the duties imposed by law upon the clerk of the county commissioners are of such a nature that he is necessarily a county officer. Numerous cases are cited in the briefs of counsel as to the difference between an officer and an employe. A careful consideration of the duties of this clerk, as set out in the statutes, shows that they are purely clerical in their nature, and not of a character that would require independent official action such as would constitute the clerk a county officer under the provisions of the constitution.

In *Kloeb, Auditor, v. Mercer County Commissioners*, 4 C. C., N. S., 565, it was held that the county auditor is a public officer, and that he is in no respect a mere clerk of the board of county commissioners, thus making the plain inference that such clerk is not an officer.

That part of old Section 845, Revised Statutes, which provided for legal counsel, was held unconstitutional in *State, ex rel. Cline, v. Cannon et al.*, 12 C. C., N. S., 103, and in *Ireton et al. v. State, ex rel. Hunt, Id.*, 202, for the reason that official

discretion was attempted to be vested in legal counsel, mere appointees of the commissioners, who were thus, as to all civil matters, given the full authority conferred by law upon prosecuting attorneys. There are numerous cases in Ohio illustrating the difference between an officer and an employe, which it is not necessary to review. Among the many citations given by counsel are 29 Cyc., 1361; *State, ex rel. Armstrong, v. Halliday, Auditor*, 61 Ohio St., 171; *State, ex rel., v. Brennan*, 49 Ohio St., 33, and *State, ex rel. Atty. Genl., v. Jennings et al.*, 57 Ohio St., 415.

In our opinion Section 2409 is constitutional.

The only other matter to be considered is as to the custody of the records of the county commissioners.

Section 2405, General Code, provides that the meetings of the board shall be "at the office of the auditor, or the usual office of the commissioners," and Section 2407, General Code, provides that "When the board is not in session, the record book shall be kept in the auditor's office, and open at all times to public inspection." A careful examination of the numerous laws in regard to the meetings of the county commissioners, and the experience of the different counties in the state, would indicate that at least in the smaller counties the auditor's office is the office used by the commissioners. The statute requires that the commissioners shall furnish an office for the auditor. In many counties there are several rooms provided. In Hamilton county, we are informed, all of the rooms that are occupied by the commissioners for the board meetings, and for the engineer's offices and road records, all of which are apart from those of the

auditor, are designated by resolution on the minutes as part of the auditor's office, so that a literal compliance may be had with the statute.

In the opinion of the court these statutes are at best directory. The purpose of the law is that the records should be safely kept, and that they should be accessible to the public as public records open for inspection at reasonable times. There is nothing in the record of this case to show that the spirit of the law has been violated in that respect, and, if it should be deemed necessary, in order to comply literally with the statute, it is a simple matter for the commissioners to designate as a part of the auditor's office the rooms in which they may find it necessary to have their records stored. When the commissioners' office is open at the same hours as the auditor's office, with a clerk present to answer questions and furnish information, and opportunity afforded any taxpayer who may desire to inspect the minutes and other records, it would appear to be entirely unnecessary for him to carry the books from the commissioners' room to the auditor's room and place the burden upon the auditor or one of his clerks or deputies to care for them and furnish information in regard to them.

The record fails to show any reason why this court should intervene by injunction to interfere with the proper custody of its records by a board of county commissioners.

The petition will therefore be dismissed at the costs of the relator.

Petition dismissed.

JONES, E. H., P. J., and GORMAN, J., concur.

RULE V. THE AUTOMATIC NEWS DISTRIBUTING CO.

*Mechanic's lien — Machines sold for and used in manufactory —
Not necessary that there be real estate to which lien can attach.*

1. It is not necessary in order for a mechanic's lien to be effective that there must be real estate of the lien debtor to which it can attach.
2. Where machines are sold for and used in erecting, altering or repairing a manufactory of the purchaser, and such machines are not attached or fastened to the building or land in such a way as to make them permanent fixtures, the seller has a mechanic's lien upon such machines.

(Decided July 19, 1915.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Gatch & McLaughlin, for The E. A. Kinsey Company.

Messrs. Overbeck, Kattenhorn & Park, for Jos. Conroy, Receiver.

JONES, E. H., J. The question this court is called upon to decide pertains to the validity of a mechanic's lien held and sought to be enforced herein by The E. A. Kinsey Company. The claim secured by the lien amounts to about \$972, with interest, which sum represents the value of two machines furnished by The E. A. Kinsey Company to The Automatic News Distributing Company, for which a receiver was appointed after the purchase of the machines.

It appears that the machinery in question has been sold by the receiver, and the proceeds are held under stipulation, subject to the determination of

the question arising on said lien. This question of the validity of the lien arises in the action originally brought for the appointment of the receiver, upon the intervening petition of The E. A. Kinsey Company seeking the enforcement of its lien.

The questions involved and discussed in the able briefs of counsel are important. We regret that time will not permit a reference to and discussion of the cases cited by counsel in support of their respective contentions.

The main question is of much importance and merits careful consideration, which it has received at our hands. It involves the construction of Section 8308, General Code, which is as follows:

"Every person who does work or labor upon or furnishes machinery, material or fuel for constructing, altering, or repairing a boat, vessel, or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure, or for digging, drilling, boring, operating, completing or the repairing of any gas well, oil well, or other well, or performs labor in altering, repairing, or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract, express or implied, with the owner, part owner or lessee, of any interest in real estate or the authorized agent of the owner, part owner, or lessee of any interest in real estate, shall have a lien to secure payment thereof upon such boat, vessel, or other water craft, or upon such house, mill, manufactory, furnace, or other building, or appurtenance, fixture, bridge, or

other structure, or upon such gas well, oil well, or other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material or machinery so furnished, and upon the interest, leasehold or otherwise, of the owner, part owner, or lessee in the lot or land upon which they may stand, or to which they may be removed."

The machines furnished by The E. A. Kinsey Company to The Automatic News Distributing Company were placed in a factory used for making vending machines. The space occupied by said factory was part of a factory building owned by The M. A. Hunt Company, and such space was leased by The Automatic Machine Manufacturing Company, by written lease duly recorded, prior to the purchase of the machines by The Automatic News Distributing Company from The E. A. Kinsey Company. These machines, it is admitted, form no part of the realty, and were not attached or fastened to the building or land in such a way as to make them permanent fixtures. In fact, one of the machines at the time the receiver was appointed had never been used. The question is: Does Section 8308, General Code, above quoted, authorize a lien upon this machinery in favor of The E. A. Kinsey Company? It is contended by the receiver that inasmuch as the lease was held by the machine company, instead of by the news company (which latter company, as will be borne in mind, purchased the machines), there can be no lien; that in order for the lien to be effective there must be some real estate of the lien debtor to which it can attach; and that this lease being held by another company makes it impossible for The E. A.

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Kinsey Company to acquire any rights as against the lessee.

There is some question raised by the evidence and the admitted facts as to whether these two companies were really different, or were, in fact, one company operating under two separate names. Under the view we take of this case this question becomes unimportant. The news company was without question operating this factory. Its name appeared over the door. The machine company had formerly operated a factory on Fourth street; the news company had taken over its machinery and equipment and removed it to the present location. Under these circumstances there can be no doubt but that the news company, the purchaser of these machines, was operating the plant. That there was a lease for the real estate on record, to some one else, does not change this fact.

It will be noticed that Section 8308, using only the words thereof that are applicable to this case, says:

"Every person who * * * furnishes machinery * * * for erecting, altering, repairing or removing * * * a * * * manufactory * * * shall have a lien to secure payment thereof upon such * * * manufactory * * * and upon the material or machinery so furnished, and upon the interest, leasehold or otherwise, of the owner, part owner, or lessee in the lot or land upon which they may stand, or to which they may be removed."

We have examined the cases cited in the briefs, as well as other authorities, and, after all, feel that we must be controlled by the provisions of the law of our state, so far as that law applies to the case

before us. A mechanic's lien is purely a creature of the statute, and in every case involving a mechanic's lien the main question must necessarily be, What does the statute provide? We have asked ourselves that question in this case, and will answer it by saying that we believe Section 8308, General Code, gives The E. A. Kinsey Company a right of lien upon the two machines furnished by it, and which were used in *erecting, altering or repairing the manufactory* of the person with whom it contracted for the sale of the machines.

Authorities are cited, and are numerous, in support of the proposition that a lien could not have been secured upon these machines, or upon other machines placed as these were in a factory, by some one who had furnished labor or material for the construction of the building wherein the factory was located. It is obvious that in such a case a mechanic's lien could only be obtained upon the building and such machinery as was a part of it under the law relating to fixtures.

The question here presented is not such a question as is discussed in those cases. The E. A. Kinsey Company only claims a lien upon the two machines which it sold and which went into and became a part of the factory. They were machines that were necessary, and that greatly added to the output and efficiency of the factory.

By its intervening petition the lien holder does not seek to enforce a lien upon the real estate, the leasehold, or any property, real or personal, except these two machines. The statute, under a fair construction, as we think, gives it the lien which it seeks to enforce. In support of this construction

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we refer to the case of *The E. A. Kinsey Co. v. Heckermann, Trustee*, 224 Fed. Rep., 308, 139 C. C. A., 544. By reference to that decision it will be found that the learned judge so construed Section 8308 of the General Code of Ohio as to uphold the lien contended for by The E. A. Kinsey Company in this case.

The prayer of the intervening petition will therefore be granted.

Judgment accordingly.

JONES, OLIVER B., and GORMAN, JJ., concur.

KAMMANN ET AL. v. KAMMANN ET AL.

Contest of will—Evidence—Directed verdict—Prima facie evidence—Quantum of evidence required in order to submit case to jury.

In an action to contest a will the *prima facie* evidence furnished by the order of probate must be first met and neutralized by sufficient evidence produced by the plaintiff. When this has been done, and in addition to the quantum of evidence necessary for such purpose evidence however slight is produced tending to prove the facts essential to plaintiff's case, then a motion for a directed verdict in favor of the defendant cannot be properly granted, but the case must be submitted to the jury under proper instructions.

(Decided June 12, 1916.)

ERROR: Court of Appeals for Hamilton county.

Messrs. Kinkead & Rogers and *Mr. Wm. Jerome Kuertz*, for plaintiffs in error.

Messrs. Herrlinger & Dixon and *Messrs. Lorbach & Garver*, for defendants in error.

JONES, OLIVER B., J. Plaintiffs in error in this proceeding seek to reverse the judgment of the court of common pleas sustaining the will of Anna M. Kammann, deceased. They are the children of the deceased brother of the testatrix, and by the terms of her will they were excluded from participation in her estate, which, with the exception of two small legacies, was left to her surviving brother and his children.

The action below to contest the validity of this will was brought under the statute. At the trial of the cause an issue was made up as to whether or not the writing produced was the last will of said testatrix, and proponents introduced in evidence said will and the order of the probate court admitting same to probate, and then rested. The contestants then offered evidence tending to show that the testatrix was without capacity to make a rational disposition of her property. At the conclusion of the evidence offered by contestants, the trial judge on motion of the proponents directed the jury to return a verdict finding that the will presented to them was the last will and testament of the testatrix. To this ruling, exception was duly taken. A motion to set aside the verdict and for new trial was filed, which was overruled, and judgment was entered on the verdict; to all of which said contestants duly excepted.

The question to be here determined is whether the trial court erred in so directing a verdict.

The laws of Ohio provide for the probate of a will in the probate court. The proceedings there are *ex parte*. (*Bradford v. Andrews*, 20 Ohio St., 208, 222.) The only testimony heard there is that

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of the witnesses to the will, and of such other witnesses as may be desired by any person interested in having the will admitted to probate. (Section 10516, General Code.) No provision is made for hearing evidence at the instance of a person opposed to the probate of the will.

While an appeal may be taken to the common pleas court by a person aggrieved in case of the refusal to admit a will to probate (Section 10532, General Code), there is no such provision where the will is admitted to probate. But, instead, a special proceeding is provided to contest a will after it has been admitted to probate, by a civil action in the common pleas court of the county in which such probate was had. (Sections 12079 to 12087, General Code.) This action can be brought by any person interested in the will; and all the devisees, legatees and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties.

When a petition to contest a will is filed the clerk of the common pleas court certifies that fact to the probate court where the will has been probated, and that court is required to forthwith transmit to the court of common pleas the will, testimony and all the papers relating thereto, together with a copy of the order of probate, all duly certified. (Section 10534, General Code.) Thereupon further proceedings for the settlement of the estate under the terms of the will are suspended until the final judgment is had in the will contest, when a copy of such final judgment shall be certified to the probate court by the clerk of the common pleas court, who shall also return to such probate court

the will and other papers theretofore transmitted by it.

In the common pleas court in the action to contest a will an issue must be made up, either by the pleadings or by order of the court, as to whether or not the writing produced is the last will of the testator. This issue must be tried by a jury. And the law provides that the verdict shall be conclusive, unless a new trial be granted, or the judgment is reversed or vacated. (Section 12082, General Code.) In this trial it is provided that the order of probate shall be *prima facie* evidence of the due attestation, execution and validity of the will. (Section 12083, General Code.) It will be observed that these two sections, 12082 and 12083, are in a measure inconsistent with each other.

Provision is made for the conduct of the trial, the proponent or party sustaining the will being entitled to open and close both the evidence and the argument. But in opening the evidence he must merely offer the will and its probate, and then rest. The contestant then offers his evidence, whereupon the rebutting evidence may be offered as in other cases. (Section 12085, General Code.)

A consideration of all these provisions shows that while the statute makes its probate *prima facie* evidence, the real test of the due attestation, execution and validity of the will is determined in the action to contest it.

The order of probate in the probate court before an action to contest the will has been filed has the force and effect of a judgment, but it is practically suspended when such contest is filed, and is superseded by the final judgment in the contest case.

The contest is an original proceeding connected only with the probate in that it cannot be commenced until the will has been probated, for the reason that until then there is in law no will to contest. It is, however, in the nature of an appeal from the order of probate; and in such contest all of the material facts as to the execution, attestation and validity of the will are placed in issue to be heard and determined *de novo*, with full opportunity for both sides to offer evidence and argument, and without reference to the order of the probate court in admitting the will to probate except that the burden of proof is thereby cast upon the contestant to invalidate the will. *Haynes v Haynes*, 33 Ohio St., 598.

The action to contest a will is denominated in Section 12079, General Code, as a civil action, and it is tried in the same manner and subject to the same rules as other civil actions, except as to any modifications required by the special statutes providing for it, found in Chapter 8, Division VII of Title IV, Part Third, General Code. While it has been held in *Walker v. Walker*, 14 Ohio St., 157, that the provisions of Section 12082, General Code, requiring a jury trial, are imperative, and in *Holt v. Lamb*, 17 Ohio St., 374, that a court cannot proceed by mere decree, without the intervention of a jury, nevertheless it is determined in *Wagner v. Ziegler*, 44 Ohio St., 60, 66, that, in such trial, where the evidence does not tend to prove the issue on the part of plaintiff showing improper restraint or incapacity of the decedent to make a will, the court has power at the conclusion

of plaintiff's testimony to direct a verdict sustaining the will.

The so-called "scintilla rule" does not apply to it in full force for the reason that the *prima facie* evidence furnished by the order of probate must be first met and neutralized by sufficient evidence. When this has been done, and in addition to the quantum of evidence necessary for such purpose evidence however slight is produced tending to prove the facts essential to plaintiff's case, then a motion for a directed verdict in favor of the defendant cannot be properly granted, but the case must be submitted to the jury under proper instructions.

In other words, in the trial of a will-contest case it is first necessary for the contestant to produce sufficient evidence as a minimum to balance that furnished by the order of probate of the will, and when that has been done and the evidence so adduced by him not only fully equalizes the *prima facie* case made for the contestee by the order of probate, but in addition to that minimum also tends to prove in all particulars the issues required to be sustained by plaintiff, then, upon the filing of a motion by defendant for a directed verdict sustaining the will, the court must apply the doctrine laid down in *Ellis & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St., 628, as to the excess evidence required beyond the minimum necessary to meet the order of probate, and treat as fully proved all that such evidence in any degree tends to prove, and take as fully established every fact that such evidence conduces to establish and all reasonable inferences from it. The court is not permitted to weigh the

evidence beyond the determination of the required minimum, because it is the right of the plaintiff to have its weight and sufficiency passed upon by the jury.

Applying these principles, upon which all the members of the court are in accord, to the case here under consideration, it is the opinion of the majority of the court that the evidence was sufficient not only to rebut the presumption arising from the probate of the will, but that it also tended to prove that testatrix was so lacking in mental capacity and so controlled by delusions that she was unable to make a rational choice in determining the proper objects of her bounty in making her will, to the extent that she was not possessed of testamentary capacity at the time of its execution (*Wadsworth v. Purdy et al.*, 12 C. C., N. S., 8), and that the trial court erred in granting the motion for a peremptory instruction (*Wilder v. Taylor et al.*, *Exrs.*, 87 Ohio St., 520).

Judge Gorman, however, is of the opinion that the evidence is not sufficient to overcome the presumption arising from the probate of the will and to require a submission of the case to the jury, and therefore dissents from the reversal of the judgment.

Judgment reversed, and cause remanded for new trial.

JONES, E. H., P. J., concurs.

GORMAN, J., dissents.

MOOREY v. THE STATE OF OHIO.

*Petition in error—Conviction for unlawful sale of liquors—
Leave to file petition in court of appeals—Time computed, how
—Sessions of court of appeals—Merits considered on motion
for leave, when.*

1. By virtue of the requirements of Section 13246, General Code, one who has been convicted before a mayor for a violation of the law prohibiting the sale of intoxicating liquors in a city, which judgment has been affirmed by the common pleas court, must, before filing a petition in error in the court of appeals, obtain leave of that court after good cause shown therefor and within the time limited in said section.
2. In computing the time within which the same must be filed, the language of the statute, "When a reviewing court is not in session," means not in session in the county in which the litigation is pending, unless the court has fixed some other county of the appellate district for the hearing of such cases; and the court of appeals is not to be deemed in session in the county in which the litigation is pending simply because the term of court therein has been formally held open.
3. If an examination of the entire record of a case coming within that statute clearly discloses that the judgments of the lower courts are right, leave to file a petition in error will be refused.

(Decided May 7, 1917.)

ERROR: Court of Appeals for Wood county.

Mr. Edward Beverstock and Mr. A. R. Campbell, for plaintiff in error.

Mr. William B. James, city solicitor, for defendant in error.

RICHARDS, J. Phillip Moorey was convicted before S. W. Bowman, mayor of the city of Bowling Green, on a charge of selling and furnishing intoxicating liquor to one John Goodman, in viola-

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tion of Section 13232, General Code, known as the Beal Local Option Law, and sentenced to pay a fine of two hundred dollars. He prosecuted error to the court of common pleas where the judgment of conviction was affirmed on December 27, 1916.

On the day the judgment was affirmed he filed a petition in error in the court of appeals to secure a reversal thereof, but this petition in error was filed without leave being granted therefor, as required by Section 13246, General Code. On the 23d day of April, 1917, the plaintiff in error, through his counsel, notified the defendant in error that he would apply to the court of appeals at the court house in the city of Bowling Green on Monday, April 30, 1917, at nine o'clock, A. M., or as soon thereafter as counsel could be heard, for leave to refile the petition in error, for the reason that the same had been filed without leave of court.

The state strenuously resists the application for leave to file a petition in error, or to refile the one which has already been filed, basing the objection on the ground that the right to file the same is barred by the terms of the statute last cited, and, on the further ground, that, even if the application is within time, the conviction and the affirmance thereof were required by the evidence, and therefore no good cause has been shown for granting the application.

The court, when these matters came on for hearing, informed counsel that it would hear the application for leave to file or refile the petition in error and would at the same time hear arguments upon the merits of the case and determine the whole controversy at one time.

By reason of the provisions of Section 13246, General Code, no authority existed for filing a petition in error until the court of appeals, after good cause shown therefor, had granted leave to file the same. We will, however, treat the application as one for leave to file a petition in error. The statute cited provides that such petition in error must be filed on or before thirty days after the judgment complained of, and that when the reviewing court is not in session within the time provided for, the motion for leave to file a petition in error and the petition in error may be filed with and heard by such reviewing court within ten days after it is in session. It is under this latter clause that plaintiff in error claims he is in time with this application.

The court of appeals began its regular session in Wood county on Monday, October 16, 1916, continuing in session in the city of Bowling Green throughout that week, and was not in session in Wood county from that time until April 30, 1917. The October term of court was, however, kept open for the transaction of such further business as might properly come before the court, such business being transacted, by consent of counsel, in Lucas county, where the court of appeals during the greater portion of that time was in session.

The language of the statute, "When a reviewing court is not in session," means not in session in the county in which the litigation is pending, unless the court has fixed some other county of the appellate district for the hearing of such cases; and the court is not in session, within the meaning of the statute, simply because the term of court has

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been formally held open for the purposes already stated. This view is confirmed by the fact that the statute uses the expression "thirty court days," and certainly days when the court was engaged in the transaction of official business in Lucas county or elsewhere could not be counted as court days in Wood county, the court not having fixed any county other than Wood for the hearing of cases pending therein. The next term of the court of appeals in Wood county began on April 30, 1917, and the plaintiff in error makes this application on the first day of the term, and is within the limitation prescribed by statute in so doing.

The case having been argued not only upon the application for leave to file a petition in error, but upon the merits, we have read the entire record with a view to ascertaining whether the conviction was justified by the evidence. The bill of exceptions contains at least the usual conflict found in cases of this character. It would be of no advantage to review this evidence. Suffice it to say, that after careful examination we are of opinion that there was sufficient evidence to clearly justify the mayor in finding the defendant guilty. Having reached this conclusion, it would be futile to permit the filing of the petition in error and then immediately enter a judgment of affirmance. For this reason we have determined that no good cause has been shown for granting leave to file the petition in error, and the application for such leave will therefore be refused.

Application refused.

CHITTENDEN and KINKADE, JJ., concur.

KELLY v. THE CITY OF CINCINNATI ET AL.

Street improvements—Special assessments cannot exceed benefits—Grading proper subject for assessment—Necessity of resolution of necessity by council—Plans of assessment cannot be commingled—Failure of property owners to file objections—Injunction.

1. When an improvement is to be made by a city for which a special assessment is to be levied, council must declare the necessity by resolution, which shall determine the nature of the improvement and the method of the assessment, and where this is not done the cost cannot be assessed.
2. Grading is a proper subject for special assessment.
3. Special assessments cannot be sustained in any instance in excess of special benefits.
4. An assessment by the front foot cannot be made under the guise of the benefit plan. Whichever plan is adopted must be pursued in accordance with the statute, and the two plans cannot be commingled.
5. The failure of property owners to file objections to special assessments under the provisions of Section 3848, General Code, does not prevent them from seeking relief under the provisions of Section 12075, General Code, where the provisions of the law relating to assessment in proportion to benefits have been clearly violated.

(Decided May 17, 1915.)

APPEAL: Court of Appeals for Hamilton county.

Mr. Oliver S. Bryant, for plaintiff.

Mr. Walter M. Schoenle, city solicitor, and *Mr. Frank K. Bowman*, assistant city solicitor, for defendants.

JONES, OLIVER B., J. This cause was heard in this court on appeal from the court of insolvency.

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Kelly v. Cincinnati.

It is a proceeding brought by owners of lots and lands abutting on Isabella street, seeking to enjoin the collection of so much of an assessment as they deem illegal and excessive levied on such lands by the city of Cincinnati for the improvement of Isabella street from Markbreit avenue to a point 610 feet south.

Isabella street is a highway in said city, extending from Markbreit avenue, almost at Madison Road, southwardly about half a mile, and that portion between its southern terminus and a point 610 feet south of Markbreit avenue had been improved by paving the roadway and setting curbs and gutters, the cost of which improvement had been assessed against the abutting property. The part of Isabella street lying between Markbreit avenue and this point 610 feet south of it had not been improved prior to the improvement for which the assessment under consideration was levied, but the lots fronting on it had been built upon and it was traveled on the natural grade of the street by vehicles, except for a portion of about 200 feet at its north end just south of Markbreit avenue, which portion was about 20 feet lower than the portions of the street both south and north of it. This low portion could not be used for vehicles, and Markbreit avenue could only be reached over this low portion of the dedicated street by pedestrians, by means of a wooden footbridge.

Preliminary to this improvement, no previous grade having been established, the city by ordinance of March 26, 1912, established the grade of Isabella street from Markbreit avenue to a point 610 feet south, the grade so fixed being that of the natural

surface of that part south of the 200-foot portion. In the improvement of said street and as a part thereof this low portion was filled with an embankment 20 feet in height by about 200 feet in length, to bring it up to such established grade, the cost of such fill being \$3,955.39. In making said improvement the city also constructed certain cement sidewalks, at a cost of \$46.08, said sidewalks not being provided for in the legislation had by the city council for the improvement.

Plaintiff, Barton H. Kelly, contends that these two items should be eliminated from the assessment to be charged against his property.

The power to levy special assessments on abutting or benefited property is conferred by statute, and this power can be exercised only in the manner provided by law. (Section 3812, General Code.) When an improvement is to be made for which a special assessment is to be levied, council must declare the necessity by resolution, which shall determine the nature of the improvement and the method of the assessment. (Sections 3814 and 3815, General Code.) It being conceded that the small item of cement sidewalk was not provided for in the legislation for this improvement, its cost cannot be assessed.

The matter of grading, however, is not so easily disposed of. The evidence submitted is in an unsatisfactory state in respect to whether grading was or was not provided for in the improvement legislation. In both the amended petition and the amended answer, on which the case was tried, it is alleged that the resolution declaring the necessity for the improvement, and the ordinance to pro-

ceed with the improvement, were for an improvement "by paving the roadway with bituminous macadam, according to certain plans and specifications then on file and according to the grade set forth in said resolution." Whether grading specifically appeared as one of the items of said improvement is not shown by the production of a copy of the resolution, the ordinance to proceed with the improvement, or the specifications. It is, however, agreed, that in order to make the grade of said street comply with the grade so established, the city in improving Isabella street constructed said fill at the cost named. And from the assessment ordinance, a copy of which was introduced, it appears that the improvement was to be "by *grading*, paving the roadway with bituminous macadam, and constructing the necessary drains and inlets."

It is contended with great ability, on behalf of plaintiff, that where in the improvement of a street it becomes necessary to radically change the natural contour of the ground in the street by grading, in order to present a proper smooth surface suitable to receive the paving, such grading is analogous to the acquirement of the land itself on which the street is built, and that its cost cannot be charged against the owners of abutting property; that, while under the old doctrine laid down in *City of Cleveland v. Wick*, 18 Ohio St., 303, such an assessment could have been upheld for the cost of the land occupied by the street, the later law, as laid down in *C., L. & N. Ry. Co. v. Cincinnati*, 62 Ohio St., 465, which directly overrules *Cleveland v. Wick*, and in *Baker v. Norwood*, 172 U. S., 269,

and *City of Dayton v. Bauman*, 66 Ohio St., 379, would forbid it. And it is argued that the same law would apply to forbid the assessment of the cost of necessary grading.

To this we cannot agree. It is common knowledge that one of the most important elements of roadbuilding is the grading of the roadbed itself to a suitable and proper grade; by excavation, where the natural surface is too high, and by embankment, where it is too low. And in a locality like Cincinnati, where the natural land is more or less hilly, this item of grading is usually one of the important matters in the improvement of a street that has not been previously improved. It is recognized as such in the statute itself by which such special assessments are authorized, Section 3812, General Code, in which section it is distinctly named as one of the elements of such an improvement. It is generally an essential part of every surface improvement, for which a special assessment may be levied not to exceed the special benefits conferred, as laid down in *Dayton v. Bauman*, *supra*, 393. Grading has been distinctly held to be a proper subject for special assessment in numerous other cases, among which are *Longworth v. Cincinnati*, 34 Ohio St., 101, and *Jessing v. Columbus*, 1 C. C., 90, 1 C. D., 54 (affirmed, *sub nom.*, *Central Ohio Rd. Co. v. Columbus*, 22 W. L. B., 453).

Counsel for plaintiff relies upon *Thale v. Cincinnati*, Court Index, Feb. 4, 1902; *Fridman v. Norwood*, 1 C. C., N. S., 97 (affirmed, 70 Ohio St., 431); *Carlisle v. Cincinnati*, 8 C. C., N. S., 46 (affirmed, 77 Ohio St., 637), and *Bartley v. Cincin-*

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nati, 8 C. C., 226. An examination of these cases shows that in each of them the item of grading which it was held could not be assessed was one occasioned by the change of an established grade to which an improvement had been previously made, and came within the terms of Section 3838, General Code.

In the legislation for this improvement it was provided that 50 per cent. of its cost, and the cost of intersections, should be paid by the city, and the remainder should be assessed upon the abutting property in proportion to the benefits resulting to it from the improvement. This is the second method of assessment provided by Section 3812, General Code.

There is no question under the evidence but that the making of this improvement, opening the street to public travel by means of this fill out to Markbreit avenue, opened up a thoroughfare of general benefit to the public, and of particular benefit not only to the north 610 feet of Isabella street, but to the southern portion of that street as well, and to cross streets and the entire neighborhood. This is undoubtedly recognized by the city in paying more than one-half of the cost. Whether this was the fair proportion of the cost to be paid by the city, and whether the district to be specially assessed as being specially benefited should have been limited as it was, are matters to be determined by the city council, and its discretion cannot be controlled by the courts in the absence of manifest abuse.

The power of the court can, however, be invoked under Section 12075, General Code, to enjoin the collection of illegal assessments, and special assess-

ments cannot be sustained in any instance in excess of special benefits. *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Walsh v. Barron, Treas.*, 61 Ohio St., 15, and *Walsh v. Sims, Treas.*, 65 Ohio St., 211.

In this case a consideration of the assessment as fixed by the ordinance to assess, confirming the report of the estimating board and the evidence as to values and special benefits, shows that the amounts assessed were not fixed as required by law in proportion to the special benefits, but that the lots abutting the fill on the east side were assessed on a basis of \$1.61 per front foot and those on the west side on a basis of \$1.04 per front foot, while all the remainder of the property was assessed at amounts that would be obtained by the uniform rate of \$4.50 per front foot.

From the evidence it is apparent to the court that the lots at the north end, abutting the fill, received as much and in fact greater benefit from the improvement than did the other property, and that the low amounts for the assessments were fixed with the idea that larger amounts might be uncollectible because of the limited value of the lots. The evidence also shows that the value of the deeper lots on the east side was greater than that of those on the west, and the special benefit was correspondingly greater.

An assessment by the front foot cannot be made under the guise of the benefit plan. Whichever plan is adopted must be pursued in accordance with the statute, and the two plans cannot be commingled. (*Kelly v. Cleveland*, 34 Ohio St., 468, and *Dick v. Toledo*, 11 C. C., 349.) See also, as to

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benefit assessments, *City of Cincinnati v. Batsche*, 52 Ohio St., 324; *Klein v. Cincinnati*, 7 C. C., 266, and *Frey v. Findlay, Id.*, 311, 319.

The property owners had an opportunity to object to this assessment under the provisions of Section 3848, General Code, and should have done so, when the amounts might have been properly equalized and adjusted under Sections 3849 and 3850, General Code. But their failure to file such objections does not prevent them from seeking relief under Section 12075, General Code, where, as in this case; the provisions of the law relating to assessment in proportion to benefits have been so clearly violated. The amended petition does not ask for an injunction against the entire assessment as levied, but only for an injunction as to any excess over what might be found to be a legal charge. The validity of the entire assessment as made is, however, brought to the consideration of the court, and with an amendment of the pleadings might be set aside as entirely illegal, with an order permitting the city to levy a reassessment. This would involve delay and expense. The evidence shows, and plaintiff admits, that his property has been specially benefited. If the amount assessed had been distributed at a uniform rate on the entire frontage assessed, it would have amounted to a rate of about \$3.45 per front foot. In the opinion of the court each of plaintiff's lots has been specially benefited to that extent, and said assessment is a proper charge in the several amounts that may result from a calculation of the front feet of the respective lots by such rate, and to that extent will be sustained.

A decree may be taken enjoining the collection of any part of said assessments in excess of such amounts.

Judgment accordingly.

JONES, E. H., P. J., and GORMAN, J., concur.

MAHONING VALLEY RAILWAY CO. v. GORZ.

Railways—Ordinary care—Toward person assisting passenger entering car—Notice of presence in car.

1. In the absence of a rule of the company or the existence of a custom permitting persons to enter its car when stopping to receive passengers, for the purpose of assisting passengers with children or baggage, a railway company, operating street cars by electricity over the streets of a city, is only required to exercise toward such persons ordinary care, after becoming aware of their presence within the car.
2. Such railway company is chargeable with notice of the presence of such persons within its car, not only when those in charge of the car have actual notice, but, when, in the exercise of ordinary care, they should have notice of their presence.
3. Ordinary care charges such railway company with notice of whatever those in charge of the car should know in the proper discharge of their duties in the operation of such car.

(Decided October 6, 1917.)

ERROR: Court of Appeals for Mahoning county.

Messrs. Harrington, DeFord, Heim & Osborn,
for plaintiff in error.

Messrs. Anderson, Lamb & Tetlow, for de-
fendant in error.

POLLOCK, J. This is an action in error and is brought to reverse a judgment obtained by Minnie Gorz against The Mahoning Valley Railway Company in the common pleas court of this county.

Minnie Gorz, the plaintiff below, was a resident of the city of Youngstown, and on the afternoon of October 17, 1915, her daughter, Mrs. Pritchard, with her child two years old, was visiting her.

About nine o'clock in the evening, the daughter wishing to go home, Mrs. Gorz took the child in her arms and in company with Mrs. Pritchard walked down Berlin street to Federal street, upon which street The Mahoning Valley Railway Company, the defendant below, maintained its tracks and operated passenger cars by electricity. They signaled an approaching car, which, when it reached the intersection of Berlin and Federal streets, stopped, and four passengers alighted. This was a regular and usual stop for the discharge and receiving of passengers.

After these passengers alighted Mrs. Gorz set the child on the rear platform of the car, and just as she set the child down, and before she had released her hold on it, the car started and continued until it crossed Berlin street.

Mrs. Gorz claims that when the car started it was started with a jerk, and that she was thrown down on the steps of the car with her feet hanging over the steps and dragged in that way across the street to where the car stopped. She did not intend to become a passenger on the car; she only intended placing the child on the platform and then withdrawing from the car, allowing the child's

mother, who intended to become a passenger, to take charge of the child.

This was a large car — possibly used in inter-urban traffic — with a partition across it, the front end being used as a smoking compartment and the rear end being occupied by ladies and other passengers. It had two steps leading down from the rear platform.

The conductor testifies that he was standing in the rear compartment, perhaps near the partition, looking through the windows watching the passengers leave the car; and to see if anyone wished to become a passenger. He testifies that he did not see Mrs. Gorz.

The errors complained of are in the charge of the court, and also that the verdict is excessive. We will direct our attention to errors that occur in the charge.

The court said to the jury that the word "dragged" as used by one or more of the witnesses, and also in the petition, would ordinarily mean that some portion of her body was dragged along the pavement, but he instructed the jury that they were not required to apply so narrow a construction, because, under this pleading, and under the evidence, whether her feet touched the pavement or not, if she was dragged along against her will forcibly by the car — whether she was lying on the car or had grasped hold of it after it had started — it would be within the meaning of the word "dragged." No doubt this expression of the court was occasioned by reason of some remarks of counsel during the argument of the case, and the court

couples what he says in regard to the petition with the language used by witnesses.

It is required of the court to explain the petition and construe the words or language used therein, but it should be left to the jury to determine the meaning of words and language used by the witnesses while testifying, and the court has no right to direct the jury to give to words used by the witnesses any other than their ordinary meaning, unless the words used had a technical meaning not known or understood ordinarily, and were so used by the witnesses. But the error complained of does not affect the substantial rights of the defendant below and for that reason was not prejudicial.

Again, the court charged the jury, in regard to the damages which the plaintiff below might recover, as follows:

"If she is entitled to recover, she is entitled to recover that fair amount of damages that you say would be to her full compensation for that which you shall determine from the evidence you have before you she has suffered in the sense of damages to her person, as a result of what you have theretofore found was a negligent omission of duty on the part of defendant."

It is urged that the court erred in using the expression, "full compensation." Mrs. Gorz was a married woman and there was testimony tending to show that she had received medical attention from two or three doctors, and that she was unable to perform her household duties, such as washing, cooking, baking, etc., and the objection to this charge was that the jury would understand from

the language that she had a right to recover for these things.

This objection would be well taken if there was no limitation or explanation of this language in the charge, but, following this language, the court limits the recovery to her pain and suffering and the disability inflicted upon her in the sense of affecting her ability to be up and about and to care for herself. The court by this part of the charge limits full compensation to her personal rights, and the jury could not misunderstand the charge.

It is further urged that the court erred in its charge in regard to the care the railway company owed to Mrs. Gorz. After saying to the jury that this lady was not a passenger, but that the railway company owed a duty toward people who came for the purpose of assisting their friends who had children or baggage in getting on the car, and that that duty was not the high degree of care owed to passengers, but ordinary care, the court used the following language:

"In other words, while they did not know that she was there, yet the law assumes that knowing that she had a legal right to be there the same as their passengers had to be there, although in fact they did not know it, they were bound to exercise every such reasonable precaution for her protection in the situation such as an ordinarily prudent person or corporation ordinarily would, considering all of the situation and surroundings."

Mrs. Gorz had a right to go out on the street with her daughter and child, who were intending to become passengers on this car, and the street car company, and others using the street, are required

to exercise ordinary care not to injure her. But, if she had remained on the street her injuries would not have occurred. It was only when she entered or placed her body within the car of the railway company that she received her injury. She did not enter this car to become a passenger, but to place therein this child who would become a passenger by reason of its mother being a passenger.

The testimony does not disclose that there was any rule of the company or any custom permitting persons to enter the car when stopped to receive passengers, for the purpose of assisting passengers who might have either children or baggage, or that it was necessary for Mrs. Gorz to assist her daughter to enter the car by placing this child upon the platform. What she did was only for her own or Mrs. Pritchard's convenience.

When Mrs. Gorz entered this car as she did, and under these circumstances, the railway company was not required to exercise toward her the degree of care required of it toward its passengers, but it owed her the duty of ordinary care after it was aware of her presence within the car. 3 Thompson on Negligence (2 ed.), Section 2658, and 2 Hutchinson on Carriers (3 ed.), Section 991.

The real question in this case to be determined is the obligation resting upon the railway company to ascertain and know when a person not intending to become a passenger is within its car. There is no testimony that the conductor or anyone in the railway company's employ knew of Mrs. Gorz's presence within the car, or that she was in such a position that the starting of the car would injure her.

It was the conductor's duty to stop the car a sufficient length of time to discharge and receive passengers; but, in the absence of a practice acquiesced in by the railway company permitting persons who do not intend to become passengers to enter the car in order to give assistance to others who do, the railway company did not owe the duty of detaining its cars to allow such persons to withdraw therefrom unless it knew of their presence therein. Neither was it required to know that all persons, other than passengers, had left the car before starting it. The obligation of the railway company to others than passengers who might be within the car is not an absolute duty but a relative duty, and arises when those in charge of the car know of the presence of such person, or in the exercise of ordinary care should know of their presence. *St. Louis & S. F. Rd. Co. v. Lee*, 37 Okla., 545, 46 L. R. A., N. S., 357; *Hill, Admx., v. L. & N. Rd. Co.*, 124 Ga., 243, 3 L. R. A., N. S., 432; *Morrow v. Atlanta & C. Air Line Ry. Co.*, 134 N. C., 92, 46 S. E. Rep., 12, and *Berry v. L. & N. Rd. Co.*, 109 Ky., 727, 60 S. W. Rep., 699.

Conductors or those in charge of electric street cars are not required, when a car stops to discharge and receive passengers, to ascertain before starting if persons not intending to become passengers have entered the car, or have placed themselves on the steps of the car in such a position that they may be injured by the starting of the car, but they are chargeable with what they know and with whatever they should see and know in the proper discharge of their duties in operating

the car. *N. Y., C. & St. L. Ry. Co. v. Kistler*, 66 Ohio St., 326.

The court in its charge in the case at bar said that "While they did not know that she was there, yet the law assumes that knowing that she had a legal right to be there the same as their passengers had to be there, although in fact they did not know it," the railway company was bound to exercise ordinary care.

By this charge the court said to the jury that Mrs. Gorz had a legal right to enter this car, to set the child on the platform, and that the railway company was bound in law to know that she was there, although it in fact did not know it. This would require an electric street car company to know that everyone who did not intend to become a passenger had withdrawn from its car before it could safely start it, and is placing a greater burden upon the company with regard to third persons than is required with regard to its passengers.

If the conductor knew, or in the exercise of ordinary care should have known, that Mrs. Gorz was within the car placing the child on the platform, he would be required to exercise ordinary care toward her, and in the exercise of that degree of care he should have delayed starting the car until she could withdraw therefrom.

We think that the giving of this instruction was error which requires a reversal of the case. We find no other errors in the record.

Judgment reversed.

METCALFE and FARR, JJ., concur.

CLUXTON v. SMITHSON.

Jurisdiction—Justice of the peace—Waiver—Defendant appears and consents to continuance.

When the subject of an action is within the jurisdiction of a justice of the peace, and the defendant, without objecting to the jurisdiction of the justice of the peace over his person, appears and consents to a continuance, before the filing of a motion to dismiss for want of jurisdiction, such defendant thereby confers jurisdiction of his person upon the magistrate.

(Decided June 9, 1915.)

ERROR: Court of Appeals for Clinton county.

Messrs. Hayes & Hayes, for plaintiff in error.

Mr. H. S. Pulse, for defendant in error.

JONES, OLIVER B., J. This action below was one brought in the court of common pleas seeking to enjoin defendant in error, C. E. Smithson, from causing an execution to issue upon a certain judgment taken against plaintiff in error before J. A. Saunier, a justice of the peace in and for Jefferson township, Clinton county, Ohio.

The petition states that Clayton Cluxton was on the 19th of March, 1913, and for many years prior thereto, a resident and freeholder of Clark township, Clinton county; that there were then two justices of the peace duly elected, qualified and acting as such in said Clark township, neither of whom was interested in the controversy or disqualified under the terms of Clause 3 of Section 10225, General Code, and therefore not competent to try the cause; and that notwithstanding said fact the de-

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fendant filed with J. A. Saunier, justice of the peace of Jefferson township, a certain bill of particulars against plaintiff claiming a money judgment for violation of a contract and upon an account for work and labor. It appears further from the petition that the justice of the peace made an entry in said case upon his docket, stating that it appeared to his satisfaction that the defendant (Cluxton) was a resident of Clark township of said county, which is an adjoining township to Jefferson township, and that there was no justice of the peace in said Clark township competent to try said cause, and that he therefore took jurisdiction of said cause.

A summons was duly issued and served upon the defendant in that action, and although the entire proceedings are not set out in the petition in this action enough is stated to make it appear that certain continuances were had from time to time in said cause, some of which were by the act of the defendant, Cluxton; and that afterwards defendant there filed a motion seeking to dismiss the action because of the want of jurisdiction of said justice of the peace for the reason that defendant was then a freeholder and not a resident of Jefferson township, and did not come within any of the exceptions contained in Sections 10224 and 10225, General Code.

This motion was overruled by the magistrate and further proceedings were had which resulted in a judgment against the defendant, who then brought this suit seeking to enjoin execution under said judgment, and to have such judgment set aside and held for naught.

A demurrer to the petition was sustained in the court below, and judgment was entered in favor of the defendant. Error is prosecuted here to reverse that judgment.

The facts set out in the petition as above stated satisfy the court that Cluxton entered a general appearance consenting to continuance before the filing of his motion in the justice's court to dismiss for want of jurisdiction, and therefore conferred jurisdiction of his person upon the magistrate. The subject-matter of the action was one over which the court had jurisdiction, and the appearance without objection to that jurisdiction at the time the continuance was arranged for gave the justice jurisdiction of the person. In *P., C. & St. L. Ry. Co. v. Fleming*, 30 Ohio St., 480, the second clause of the syllabus is as follows:

"Where the subject of the action is within the jurisdiction of a justice of the peace, and the parties appear before such nearest justice, agree upon a day of trial, which is assented to by the justice, and thereupon the defendant demands a jury, which is awarded him, he thereby waives all objection to the jurisdiction of such justice to try the case."

The finding made by the magistrate upon which he took jurisdiction, which is set out in full in the petition, should have stated the reasons why neither of the two magistrates in Clark township was then competent to try said cause. But under the liberal construction that is allowed to the record of an inferior court, in reviewing its proceedings, this clause might itself be considered sufficient, so long as reasons contrary to the finding of the jus-

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tice do not appear upon the record. *Beebe v. Scheidt*, 13 Ohio St., 406, 416, and *McCurdy v. Baughman*, 43 Ohio St., 78.

The defendant before the magistrate, to preserve his rights, could have introduced evidence showing the competency of one of said magistrates of Clark township, to support his motion, and could have brought error proceedings from the court of the justice of the peace to the common pleas court and have thus procured a reversal of any judgment entered against him; having failed to pursue this right under the law equity will refuse him a remedy.

"The authority of a magistrate cannot be collaterally attacked. A resident householder of one township being sued before a magistrate in another township, going to trial on the merits of the case without objection to the jurisdiction of the magistrate over him, will be taken to have waived his right to so object." *Caldwell v. High*, 6 W. L. B., 201.

The demurrer to the petition was properly sustained, and the judgment is affirmed.

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Actions for permanent or continuing trespass or nuisance, and statute of limitations. See *Louisville Brick Co. v. Calmeslat*, 435.

CONTRACTS—

Defense does not lie that note without consideration because executed, without interest, in payment of insurance policy, and therefore violates Section 9404, General Code, forbidding rebates, when. See *McDonald & Frasier v. Schervish*, 88.

Second wife entitled to proceeds of policy as against children of first wife, where policy payable to wife of insured. See *Sherry v. Life & Accident Assn.*, 228.

Conversations between witness and decedent inadmissible in action against executor for services rendered decedent, when—Jurisdiction of Cincinnati municipal court. See *Keck, Esr., v. Bahlke*, 246.

No inference that compensation received during lifetime of decedent was in full payment for services, when—Action against estate not barred by absence of express contract, when. See *Leen, Admr., v. Leen*, 254.

Will executed in pursuance of oral agreement, and although revoked, may be enforced by devisee as a contract, when—Enforcement against holder of realty. See *Ralston v. McBurney et al.*, 303.

Construed most strongly against person preparing same—Reformation of description of property in fire insurance policy. See *Machine Tool Co. v. Fire Ins. Co.*, 313.

Guardian not liable in representative capacity on contract with third person for services rendered ward or estate, when. See *Payne v. Reck, Gdn.*, 327.

The Ford Motor Co. contract is not violative of the Sherman anti-trust law or against public policy—Under such limited-agency contract the agent cannot convey title. See *Orebaugh v. Neu*, 404.

Contributory Negligence—Corporations.

CONTRIBUTORY NEGLIGENCE—

Where evidence establishes negligence by both employer and employe, question of degree is for jury, when. See *Cin. & Cols. Trac. Co. v. Murphy*, 1.

Charge to jury as to comparative negligence, apportionment of damages and assumption of risk of stumbling over necessary parts of machine. See *Reeves Bros. Co. v. Cochli*, 32.

Negligence not attributed by mere use of chain-driven automobile truck, where injury results from plaintiff assuming dangerous position, when. See *Farrell v. Roche-Bruner Bldg. Co.*, 93.

Warehouseman liable where his negligence commingled with act of God to produce damage to goods, but excused for failure to exercise ordinary care, when. See *B. & O. S. W. Rd. Co. v. Wuest*, 127.

Injuries received from coffee mill are result of accident, and not from operation of dangerous machine, when. See *P. & C. Schneider Co. v. Wagner*, 232.

Charge to jury as to speed of motorcycle which collided with barricade in road undergoing repairs—Imputed negligence. See *Gregg et al. v. Clapham et al.*, 363.

CONVEYANCES—

Specific devise to widow, with remainder over, not defeated by testator imperfectly executing deeds which were not delivered, when. See *Mateer, Exr., v. Croft*, 13.

CORPORATIONS—

1. *Imputed knowledge of agent*—The knowledge acquired by an officer of a corporation, when acting in his official capacity and in regard to a matter with which he is especially charged by the board of directors, is the knowledge of the corporation for any and all judicial purposes. *Jackson v. Foundry & Machine Co.*, 171.

2. *Imputed knowledge—Unauthorized warrants to confess judgment*—The secretary-treasurer of a corporation, together with its president, having been authorized by the board of directors to make notes to banks to cover overdrafts, and having without authority executed notes with warrants of attorney containing power to confess judgment against the company and in favor of the obligee therein named, the knowledge of the secretary-treasurer thereby obtained that the notes contained such warrants is the knowledge of the corporation. *Id.*

Corporations.

CORPORATIONS—Continued.

3. *Ratification of agent's acts by acquiescence*—When knowledge is obtained by a corporation of an unauthorized act of its officer it may ratify the same by acquiescence, continued for a number of years, without any formal action by its board of directors. *Ib.*
4. *Ratification by acquiescence—Unauthorized warrants to confess judgment*—When a corporate officer signs notes authorized by the board of directors containing unauthorized warrants of attorney for the entry of judgment by confession, and the notes remain unpaid, save the payment of the annual interest thereon, for more than thirteen years, such acquiescence on the part of the corporation is a ratification of the unauthorized acts of its officers. *Ib.*
5. *Nonfeasance of stockholders and directors—Agent's unauthorized acts bind corporation, when*—If the stockholders of a corporation permit the directors to surrender their powers and functions to an executive officer of the corporation as a continuous and permanent arrangement, the board of directors being entirely inactive and the officer discharging all its duties, the acts of such officer under such circumstances are binding upon the corporation. *Ib.*
6. *Judgment on unauthorized warrants to confess—Corporation bound, when*—So, where the general manager of a corporation whose board of directors as such has become defunct with the knowledge and consent of the stockholders, and the general manager with their consent directs and controls all its business affairs, a note signed by the president of the corporation and by such general manager as secretary, containing warrants of attorney for the confession of judgment, is binding upon the corporation and it cannot avoid a judgment obtained by confession in a suit on such note on the ground that the execution of the note by the general manager was unauthorized and void. *Ib.*
7. *Pleading—Sufficiency of averments as to partnership*—In an action by a partnership on notes containing warrants of attorney for the entry of judgment by confession, failure to aver in the petition that the partnership was formed for the purpose of carrying on a trade or business in Ohio does not render the judgment void. *Ib.*

Corporations—County Commissioners.

CORPORATIONS—Continued.

In action on judgment, parol evidence admissible to show that partnership misdescribed as a corporation, when. See *Jackson v. Foundry & Machine Co.*, 171.

COUNCIL—

Injunction lies against improvement or repair of sidewalk authorized by city council, when. See *Thompson v. Cincinnati*, 420.

Special assessment defeated where council fails to pass resolution of necessity for street improvement. See *Kelly v. Cincinnati*, 466.

COUNTIES—

Sufficiency of allegations that funds available in county treasury to pay claim sued on. See *Nussdorfer v. State, ex rel. Miller*, 121.

COUNTY COMMISSIONERS—

1. *Records—Judicial construction—Technical precision not required*—In construing the records of county commissioners, acting within the scope of their authority, to ascertain whether or not they have followed certain statutory requirements, technical precision will not be required. It will be sufficient if it appear, though informally, from a reasonable construction of the whole transcript of the proceedings, that these requirements have been observed. *State, ex rel., v. Commissioners*, 440.
2. *Discretion—Interference by injunction*—It is not a proper exercise of the judicial powers of a court to interfere by injunction with the legitimate discretion of county commissioners, so long as that discretion is being honestly exercised by them in good faith within the limits of the powers conferred by statute. *Ib.*
3. *Clerk—Not county officer—Appointment*—The duties of the clerk of the county commissioners, appointed under the provisions of Section 2409, General Code, are purely clerical in their nature, and not of a character that would require independent official action such as would constitute the clerk a county officer under the provisions of the Constitution of Ohio. *Ib.*

County Officers—Court Procedure.

COUNTY OFFICERS—

Clerk to county commissioners, appointed under Section 2409, General Code, not a county officer. See *State, ex rel., v. Commissioners*, 440.

COUNTY ROADS—

Establishment proceedings—Failure to notify land owners—Proceedings to lay out, not invalid, when—The failure, in a proceeding for the establishment of a public county road, to give a notice required for the purpose of furnishing an opportunity to the owner of land taken for the opening of the road to claim compensation, does not render invalid the proceedings for the laying out of the road. *Harkness & Cowing Co. v. St. Bernard*, 369.

COURSE OF EMPLOYMENT—

Whether employe, who had reported for duty but had not begun work, was acting within scope of employment is jury question. See *Cin. & Col. Trac. Co. v. Murphy*, 1.

COURT OF APPEALS—

Jurisdiction to vacate or modify alimony judgment rendered by circuit court. See *Graff v. Graff*, 260.

Reviewing court will not reverse where jury was properly charged as to whether release or settlement was bar to action for damages, when. See *O'Grady v. City of Newark*, 388.

Under Section 10861, General Code, final judgments of justice of peace may be reviewed on weight of evidence, when. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

Petition in error, to review conviction for unlawful sale of intoxicating liquors, cannot be filed without leave—Sessions of court and time for filing application. See *Moorey v. State*, 462.

COURT PROCEDURE—

Degree of negligence by both employer and employe and scope of employment are jury questions—Presumption that both parties free from negligence. See *Cin. & Col. Trac. Co. v. Murphy*, 1.

Charge to jury in action for damages by one injured when about to board car—Effect of incorporating entire petition in charge. See *Cincinnati Traction Co. v. Weber*, 17.

Court Procedure.

COURT PROCEDURE—Continued.

Model of machine admissible in evidence, when—Charge to jury as to comparative negligence and apportionment of damages—Assumption of risk of stumbling over parts of machine. See *Reeves Bros. Co. v. Cochli*, 32.

Reviewing court may require reproduction of moving picture film attached as exhibit to bill of exceptions, when. See *Duncan, Recr., v. Kiger*, 57.

Inherent power and authority of courts to enforce decrees and orders by contempt proceedings. See *In re Whallon*, 80.

Memorandum made by witness after event took place and concerning which his memory is extinguished, is inadmissible, when. See *Cincinnati Traction Co. v. Hackett*, 97.

Slightest evidence precludes court from charging jury as to want of evidence of material fact—Injury as cause of appendicitis. See *Cincinnati Traction Co. v. Frank*, 112.

Prejudicial error to fail to charge jury as to defenses of want and failure of consideration, fraud and burden of proof, when. See *Klein & Heffelman Co. v. Peterman*, 145.

In action on judgment, parol evidence admissible to show that partnership misdescribed as a corporation, when. See *Jackson v. Foundry & Machine Co.*, 171.

Courts will take judicial notice that flood of March, 1913, was an act of God, when. See *Joslin-Schmidt Co. v. B. & O. S. W. Rd. Co.*, 193.

Authority of trial judge to correct errors of judge who rules on interlocutory matters. See *Pagel v. Creasy et al.*, 204.

Conversations between witness and decedent inadmissible in action against executor for services rendered decedent, when—Jurisdiction of Cincinnati municipal court. See *Keck, Exr., v. Bahlke*, 246.

Judge not authorized to set aside suspended sentence after expiration of period of original sentence. See *In re Pontius*, 249.

Trial court may require special findings of facts by jury, when—Special findings control over general verdict, when. See *Simms v. Stark Elec. Ry. Co.*, 264.

Defendant in alimony proceeding may establish invalidity of marriage by evidence of prior marriage, when. See *Pappalardo et al. v. Pappalardo*, 291.

Evidence required to engraft trust on land, under claim for funds advanced toward joint purchase. See *Wagner v. Wagner et al.*, 297.

Court Procedure—Criminal Law.

COURT PROCEDURE—Continued.

Proof necessary to sustain action against municipality for damages resulting from change in street grade. See *Middletown v. Doty*, 333.

Charge to jury as to speed of motorcycle which collided with barricade in road undergoing repairs—Imputed negligence. See *Gregg et al. v. Clapham et al.*, 363.

Acts necessary to constitute election by widow to take under will. See *Ewalt, Admr., v. Ames et al.*, 374.

Release from damages for personal injury admissible in evidence, but sufficiency and weight are jury questions—Charge to jury as to release being bar to action. *O'Grady v. City of Newark*, 388.

Technical precision not required of records of county commissioners. See *State, ex rel., v. Commissioners*, 440.

Verdict not to be directed in will contest, when. See *Kammann v. Kammann*, 455.

COURT RECORDS—

Equivocal or ambiguous entry upon court docket or journal may be explained by parol evidence, when. See *James v. Hotel Howing Co.*, 162.

CRIMINAL LAW—

1. *Indictment—Sufficiency—Sale of obscene photograph—Copy or description thereof*—The rules of criminal practice require that an indictment charging the sale of an obscene, lewd and lascivious photograph should set forth a copy thereof, or give such a description as decency permits and aver that the photograph is too obscene for further description or recital. *Charville v. State*, 236.

2. *Reversible error—Insufficient indictment—Section 13581, General Code—Curative provisions*—An indictment for this offense, which does not give a copy of the obscene photograph, nor an excuse for its omission, is defective, but such defect is within the curative provisions of Section 13581, General Code, and a judgment of conviction will not be reversed where such defect does not prejudice the substantial rights of the defendant on the merits. *Ib.*

3. *Jurisdiction—Suspended sentence—Revocation and termination—After expiration of maximum term—Habeas corpus*—A judge has no authority to set aside a sentence which he has there-

Criminal Law—Defective Sidewalk.

CRIMINAL LAW—Continued.

tofore suspended, if the period covered by the sentence as originally pronounced has expired. *In re Pontius*, 249.

4. *Failure to support minor children—Indictment in one count—Charges failure as to two children—Validity of conviction as to one child—And acquittal as to other*—It is not error, under an indictment charging the defendant with failure to support his two minor children under sixteen years of age, to adjudge him guilty with respect to one of said children and not guilty with respect to the other, and to impose sentence in the one case, in default of bond conditioned upon his providing said neglected child with a proper home, food and clothing in the future, where no objection was made to the form of the indictment in the trial court. *Baker v. State*, 339.

Municipal ordinance punishing vagrancy not invalid because word "loitering" used in defining offense, when. See *Bader, Supt., v. McCartin*, 76.

Plea of former jeopardy does not lie where verdict of not guilty directed by court because prior indictment fatally defective. See *Sigourney v. State*, 156.

DAMAGES—

Charge to jury as to comparative negligence and apportionment of damages. See *Reeves Bros. Co. v. Cochli*, 32.

Actions for permanent or continuing trespass or nuisance, and statute of limitations. See *Louisville Brick Co. v. Cismelat*, 435.

DANGEROUS MACHINE—

Injuries received from coffee mill are result of accident, and not from operation of dangerous machine, when. See *P. & C. Schneider Co. v. Wagner*, 232.

DEEDS—

Specific devise to widow, with remainder over, not defeated by testator imperfectly executing deeds which were not delivered, when. See *Mateer, Exr., v. Croft*, 13.

DEFECTIVE SIDEWALK—

Cause of action against municipality not stated by petition alleging injuries caused by slipping on 10-inch inclined sidewalk covered with ice, when. See *Ritter v. City of Toledo*, 72.

Defenses—Descent and Distribution.

DEFENSES—

Prejudicial error to fail to charge jury as to defenses of want and failure of consideration, fraud and burden of proof, when. See *Klein & Heffelman Co. v. Peterman*, 145.

DELIVERY—

Inter vivos gift of certificates of stock, subscribed and delivered but not endorsed by donor, is completed, when. See *Ewalt, Admr., v. Ames et al.*, 374.

DEMURRAGE CHARGES—

*Refusal of consignee to accept freight—Notice by carrier to consignor—Duty of consignor to give disposition of rejected shipments—*When a consignee refuses to accept and unload certain carloads of freight, and the consignor, upon notice of that fact and request from the carrier, refuses to give disposition of the same for the assigned reason that it is not the owner of the contents of the cars and has no right to dispose of same, the consignor is liable for the demurrage charges accruing after the shipment was rejected by the consignee, it being the duty of the consignor, under such circumstances, to promptly give disposition of cars upon request from the carrier so to do. *Moore's Lime Co. v. N. & W. Ry. Co.*, 159.

Car demurrage rule and average agreement inapplicable where conditions result from act of God. See *Joslin-Schmidt Co. v. B. & O. S. W. Rd. Co.*, 198.

DEPOSITIONS—

Commissioner appointed by court of another state to take depositions, may commit witness for contempt, when. See *Schott v. Benckenstein*, 63.

DESCENT AND DISTRIBUTION—

*Wills—Estates by devise—Estates by purchase—Ancestral and nonancestral property—*Where a testator in his last will and testament provides as follows: "I give, devise and bequeath to my daughter, A. Y., my farm in Poland Township, on which I now reside, consisting of one hundred acres of land, to her and her heirs and assigns forever, providing she pay to the executor or executors of my estate, the sum of four thousand dollars. * * * The money arising from the sale of my farm, as hereinbefore bequeathed to my daughter, A. Y.,

Descent and Distribution—Ditch Proceedings.

DESCENT AND DISTRIBUTION—Continued.

* * * shall then be divided share and share alike. * * * I do hereby nominate and appoint my son J. Y., without bond, executor of this, my last will and testament, and give him full power to convey my farm to my daughter, A. Y.,” the payment by the daughter of the \$4,000 creates and invests said daughter with an estate by purchase and not by devise. *Beight v. Organ et al.*, 281.

DIRECTED VERDICT—

Plea of former jeopardy does not lie where verdict of not guilty directed by court because prior indictment fatally defective.

See *Sigourney v. State*, 156.

Verdict not to be directed in will contest, when. See *Kammann v. Kammann*, 455.

DIRECTORS—

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgments, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

DISCRETION—

Discretion of joint district tuberculosis hospital board cannot be controlled by courts, when. See *State, ex rel., v. Brenner*, 209.

Discretion of county commissioners will not be interfered with by injunction, when. See *State, ex rel., v. Commissioners*, 440.

DISTRIBUTION—

Per capita distribution favored where testator leaves undetermined the proportions in which beneficiaries to take—Devise to children of two daughters of testator. See *Broermann, Jr., v. Kessling*, 7.

DITCH PROCEEDINGS—

1. *Petition for tiling—Hearing—Request for tiling unnecessary, when*—It is unnecessary, when township trustees are proceeding under a petition containing an express prayer for the tiling of a ditch, that one or more of the parties interested should make a written request, at the hearing of the petition, that the tiling be done. *Trustees of Wilson Tp. v. Gilbert*, 39.

Ditch Proceedings—Divorce and Alimony.

DITCH PROCEEDINGS—Continued.

2. *Petition for tiling*—Township trustee may join in same, when—There is no inhibition against an owner of real estate filing or joining in a petition to township trustees for an improvement of a ditch merely because at the time he happens to be a member of the board of township trustees, and the proceedings for such improvement are not invalid where the record shows that such trustee took no part, as trustee, in the proceedings by the board of trustees in relation to the matter, and that all proceedings were conducted by the other members of the board who constituted a quorum and had power to act. *Ib.*

DIVORCE AND ALIMONY—

1. *Appeal or error does not lie*—No appeal or review by error proceedings of a divorce decree can be had. *Pappalardo et al. v. Pappalardo*, 291.
2. *Validity of marriage—Appeal or error in alimony case*—In the prosecution of error or appeal in a suit involving the right to alimony on the part of the wife, the parties are not concluded by a decree of divorce, previously rendered, so far as the validity of the marriage is concerned. *Ib.*
3. *Validity of marriage—Evidence—Appeal or error in alimony case*—In a suit for alimony where the defendant claims that he was never legally married to the plaintiff, for the reason that he had a first wife still living at the time plaintiff claimed the marriage took place and that no divorce had been had between such first wife and the defendant, it is error to refuse to permit the defendant to testify as to his former marriage and to exclude the testimony of witnesses who were present at the church and witnessed the former wedding. *Ib.*

Judgment for alimony relates back to date of filing petition and allowance of restraining order against lands, and defeats lien of another judgment, when. See *Loan & Bldg. Co. v. Concrete Co.*, 43.

No constitutional right violated by imprisonment for contempt for failure to pay alimony judgment—Presumption that defendant failed to prove inability to pay alimony. See *In re Whallon*, 80.

Court of appeals has jurisdiction to vacate or modify alimony judgment rendered by circuit court, when. See *Graff v. Graff*, 260.

Docket—Domestic Relations.

DOCKET—

Equivocal or ambiguous entry upon court docket or journal may be explained by parol evidence, when. See *James v. Hotel Honing Co.*, 162.

DOG BITE—

Knowledge of vicious propensities—Liability for injuries inflicted—The owner or harbinger of a dog is liable in law for the injuries inflicted by such animal, regardless of the viciousness or fierceness of the dog. Ignorance of the dog's vicious propensities does not relieve the owner or harbinger from liability. *Mehmert v. Kelso*, 69.

DOMESTIC RELATIONS—

Judgment for alimony relates back to date of filing petition and allowance of restraining order against lands, and defeats lien of another judgment, when. See *Loan & Bldg. Co. v. Concrete Co.*, 43.

No constitutional right violated by imprisonment for contempt for failure to pay alimony judgment—Presumption that defendant failed to prove inability to pay alimony. See *In re Whallon*, 80.

Second wife entitled to proceeds of policy as against children of first wife, where policy payable to wife of insured, when. See *Sherry v. Life & Accident Assn.*, 228.

Court of appeals has jurisdiction to vacate or modify alimony judgment rendered by circuit court, when. See *Graff v. Graff*, 260.

Divorce decree cannot be reviewed by appeal or error—Validity of marriage may be challenged on review of alimony proceedings, when—Evidence of prior marriage competent, when. See *Pappalardo et al. v. Pappalardo*, 291.

A wife who survives devisee, but dies before conditional devise operative, not entitled to dower, when. See *Parthe et al. v. Parthe et al.*, 317.

One indicted for failure to support his two children may be convicted as to one and acquitted as to the other, when. See *Baker v. State*, 339.

Double Agency—Eminent Domain.

DOUBLE AGENCY—

Agent of vendor cannot recover additional compensation for resale of goods without consent of both principals, when. See *Pagel v. Creasy et al.*, 199.

DOWER—

A wife who survives devisee, but dies before conditional devise operative, not entitled to dower, when. See *Parthe et al. v. Parthe et al.*, 317.

EDUCATION—

County board of education may dissolve two village school districts and consolidate them, when. See *Fisher v. Whittus et al.*, 415.

EJECTION—

Street railway company liable to passenger who was given wrong transfer by one conductor and ejected by another conductor, when. See *Diehl v. Cincinnati Traction Co.*, 151.

ELECTIONS—

Compensation of deputy state supervisors—Primaries—Section 4990, General Code—The compensation provided for deputy state supervisors of elections for the holding of primary elections is two dollars for each and every election precinct in the county for each and every primary election held under authority of law. *Nussdorfer v. State, ex rel. Miller*, 121.

ELECTION TO TAKE—

Acts necessary to constitute election by widow to take under will. See *Ewalt, Admr., v. Ames et al.*, 374.

EMINENT DOMAIN—

Land owner's right of compensation—Or to be party to proceedings—An owner whose lands are about to be taken for any public purpose, without such owner being made a party to the condemnation proceedings and without compensation first being made, is entitled to have relief by way of injunction to protect his property. *State, ex rel., v. Brenner*, 209.

Employer and Employee—Error Proceedings.**EMPLOYER AND EMPLOYEE—**

Receipt of award from workmen's compensation fund not bar to action by employee against joint tort-feasor, when. See *Ohio Trac. Co. v. Washington*, 273.

EMPLOYERS' LIABILITY—

Bad faith not shown by averments of petition to recover from indemnity company difference between employee's verdict and proposed settlement with employer. See *Wire Spring Co. v. Assurance Corp.*, 344.

ENDORSEMENTS—

Inter vivos gift of certificates of stock, subscribed and delivered but not endorsed by donor, is completed, when. See *Ewalt, Admr., v. Ames et al.*, 374.

ENGINEERS—

City engineer employed by board of rapid transit commissioners, under Section 4000-18, General Code (106 O. L., 286), not entitled to additional compensation, when. See *Rogers v. Cincinnati*, 218.

EQUITY—

Remedy may be invoked, when—The jurisdiction of a court of equity cannot be invoked when the plaintiff has a plain, adequate remedy at law. See *Harlan v. Veidt*, 45.

Injunction lies against improvement or repair of sidewalk authorized by council, when. See *Thompson v. Cincinnati*, 420.

Legal remedies must be exhausted before injunction lies against illegal taxation. See *Helmets et al. v. McCarthy et al.*, 423.

ERROR PROCEEDINGS—

Reviewing court may require reproduction of moving picture film attached as exhibit to bill of exceptions, when. See *Duncan, Recr., v. Kiger*, 57.

Order of contempt imports verity, and presumption obtains that defendant failed to prove inability to pay alimony judgment—*Habeas corpus* cannot be used to review errors of court, when. See *In re Whallon*, 80.

Divorce decree not subject to review, when—Validity of marriage may be challenged in alimony proceeding, when—Evi-

Error Proceedings—Evidence.

ERROR PROCEEDINGS—Continued.

- dence of prior marriage competent, when. See *Rappalardo et al. v. Pappalardo*, 291.
- Reviewing court will not reverse where jury was properly charged as to whether release or settlement was bar to action for damages, when. See *O'Grady v. City of Newark*, 388.
- Under Section 10361, General Code, final judgments of justice of peace may be reviewed on weight of evidence, when. See *N. Y. Cent. Rd. Co. v. Peah*, 399.
- Petition in error, to review conviction for unlawful sale of intoxicating liquors, cannot be filed without leave of court of appeals—Sessions of court and time for filing application. See *Moorey v. State*, 462.

ESTATES—

- Jurisdiction of Cincinnati municipal court of action against executor on rejected claim—Conversations between witness and decedent inadmissible, when. See *Keck, Exr., v. Bahlke*, 246.
- No inference that compensation received during lifetime of decedent was in full payment for services, when—Action against estate not barred by absence of express contract, when. See *Leen, Admr., v. Leen*, 254.
- A wife who survives devisee, but dies before conditional devise operative, not entitled to dower—Sale of prospective interest by contingent devisee does not defeat claim of his son, when. See *Parthe et al. v. Parthe et al.*, 317.
- Guardian not liable in representative capacity on contract with third person for services rendered ward or estate, when. See *Payne v. Reck, Gdn.*, 337.
- Inter vivos gift of certificates of stock, subscribed and delivered but not endorsed by donor, is completed, when. See *Ewalt, Admr., v. Ames et al.*, 374.

EVIDENCE—

1. *Bill of exceptions—Exhibits—Moving picture film—Reproduction to reviewing court*—When a bill of exceptions contains the film of a moving picture which was reproduced in the trial court, a reviewing court has power to order a reproduction of the same before it, by a competent expert, this course being a method of unfolding the exhibit so as to make it visible to the reviewing court. *Duncan, Recr., v. Kiger*, 87.

Evidence.

EVIDENCE—Continued.

2. *Newly discovered evidence—Petition for new trial after term*—It is not error to refuse to grant a petition for a new trial, filed after the term at which the verdict was rendered, based on the claim that the plaintiff in a personal injury case concealed an X-ray plate giving a view of his injured ankle, where such plaintiff denies ever having had possession of the plate, which was made under the direction of a surgeon employed by the defendant, and there is no evidence to show what the missing plate, if produced, would disclose as to the condition of plaintiff's ankle. *Ib.*
8. *Memorandum—Memory of witness as to event extinguished—Memorandum inadmissible unless virtually coincident with the event*—Where the memory of a witness as to an event is extinguished and a memorandum made by the witness is offered as substantive evidence, he testifying to it as correct but recollecting nothing as to its contents, it is inadmissible unless it is shown to be virtually coincident with the event, and this is eminently the case when the concoction is in view of litigation. *Cincinnati Traction Co. v. Hackett*, 97.
4. *Parol—Equivocal or ambiguous entry—Explanation of discharge—Malicious prosecution*—In an action for malicious prosecution resulting from the arrest of plaintiff, caused by defendant, in the municipal court of Cincinnati, on the charge of defrauding an innkeeper, evidence was introduced by the testimony of the deputy clerk of the municipal court, who produced and identified the judge's and clerk's dockets of the municipal court, each of which showed the notation as to said case: "Dismissed for want of prosecution. Costs of warrant." The trial court refused to permit the plaintiff to answer the question: "Were you actually dismissed from that court?" *Held*: That it was error in the trial court to refuse to permit the plaintiff to testify as to the fact of his dismissal, considering the equivocal or ambiguous entry found in the journal. *James v. Hotel Honing Co.*, 162.
5. *Parol—Entry on court journal or docket*—An equivocal or ambiguous entry appearing upon the docket or journal of a court may be explained by parol evidence. *Ib.*
6. *Parol—Identity of parties—Misdescription*—In a suit on a judgment oral evidence is admissible to show that the plaintiff in the record of the judgment is identical with the plaintiff in such suit. *Jackson v. Foundry & Machine Co.*, 171.

Evidence—Execution.

EVIDENCE—Continued.

7. *Parol—Misdescription of partnership as corporation*—Where, from the oral evidence, it appears that in the record of the judgment the plaintiff therein was by mistake described as a corporation, when in fact the plaintiff was a partnership, or its assignee, seeking to recover on the judgment, such evidence should not be excluded. *Ib.*
8. *Conversations—Suit against executor—Contract for services to decedent*—Conversations between witnesses and a decedent are not admissible in evidence on behalf of decedent's executor in a suit against such executor on a contract made by decedent, where such conversations were had in the absence of the other party to such contract. *Keck, Exr., v. Bahlke*, 246.
- Model of machine which injured employe, admissible in evidence, when. See *Reeves Bros. Co. v. Cochli*, 32.
- Commissioner appointed by court of another state to take depositions, may commit witness for contempt, when. See *Schott v. Benckenstein*, 63.
- Sufficiency of evidence to preclude charge that injury not the result of appendicitis. See *Cincinnati Traction Co. v. Frank*, 112.
- Defendant in alimony proceeding may establish invalidity of marriage by evidence of prior marriage, when. See *Pappalardo et al. v. Pappalardo*, 291.
- Evidence required to engraft trust on land, under claim for funds advanced toward joint purchase. See *Wagner v. Wagner et al.*, 297.
- Proof necessary to sustain action against municipality for damages resulting from change in street grade. See *Middletown v. Doty*, 333.
- Charge to jury as to speed of motorcycle which collided with barricade in road undergoing repairs—Imputed negligence. See *Gregg et al. v. Clapham et al.*, 363.
- Acts necessary to constitute election by widow to take under will. See *Ewalt, Admr., v. Ames et al.*, 374.
- Release from damages for personal injury admissible in evidence, but weight and sufficiency are jury questions. See *O'Grady v. City of Newark*, 388.

EXECUTION—

- Doctrine that concealment defeats claimant's exemption in lieu of homestead, inapplicable in proceedings in aid of execution, when. See *Bolan v. Mitchell Brick Co.*, 166.

Executors and Administrators—Failure of Consideration.

EXECUTORS AND ADMINISTRATORS—

1. *Action for services rendered decedent—No inference of adequacy of compensation*—In an action against the administrator of a deceased person for services rendered the deceased during his lifetime, the plaintiff being by statute disqualified as a witness, there can be no inference that nothing was said between plaintiff and deceased about the inadequacy of the compensation being paid. *Leen, Admr., v. Leen*, 254.

2. *Express contract not prerequisite to recovery, when*—A person not related to another by blood, and not in any sense a member of his family or household, is not barred from recovering for services rendered, merely because no express contract is shown. *Ib.*

Jurisdiction of Cincinnati municipal court of action against executor on rejected claim—Conversations between witness and decedent inadmissible, when. See *Keck, Exr., v. Bahlke*, 246.

Question of jurisdiction on appeal from refusal of probate court to appoint administrator, cannot be raised after such appointment by common pleas court, when. See *Ewalt, Admr., v. Ames et al.*, 374.

EXEMPTIONS—

Doctrine that concealment defeats claimant's exemption in lieu of homestead, inapplicable in proceedings in aid of execution, when. See *Bolan v. Mitchell Brick Co.*, 166.

EXHIBITS—

Reviewing court may require reproduction of moving picture film attached as exhibit to bill of exceptions, when. See *Duncan, Recr., v. Kiger*, 87.

EXTENSIONS—

Continuing in possession after expiration of term, without express notice to lessor, renders lessee liable for rent for full renewal period, when. See *Gross v. Clauss*, 140.

FAILURE OF CONSIDERATION—

Defense that note without consideration because executed, without interest, in payment of life insurance policy, and violates Section 9404, General Code, forbidding rebates. See *McDonald & Frasier v. Schervish*, 88.

Failure of Consideration—Forfeiture.

FAILURE OF CONSIDERATION—Continued.

Prejudicial error to fail to charge jury as to defense of want and failure of consideration, when. See *Klein & Heffelman Co. v. Peterman*, 145.

FAILURE TO SUPPORT—

One indicted for failure to support his two children may be convicted as to one and acquitted as to the other, when. See *Baker v. State*, 339.

FEES—

Deputy state supervisors of elections entitled to compensation according to number of primary elections held, when. See *Nussdorfer v. State, ex rel.*, 121.

Chief of police not entitled to fees for services in state cases in police court, when. See *Haserodt v. State, ex rel.*, 354.

FINDINGS OF FACTS—

Trial court may require special findings of facts by jury, when—Special findings control over general verdict, when. See *Simms v. Stark Elec. Ry. Co.*, 264.

FIRE INSURANCE—

Courts will reform description of property in fire insurance policy, when—Contracts construed most strongly against person preparing same. See *Machine Tool Co. v. Fire Ins. Co.*, 313.

FIXTURES—

Real estate unnecessary for mechanic's lien to attach—Lien by vendor on machines. See *Rule v. Automatic News Co.*, 450.

FORECLOSURE—

Where lease forfeited for nonpayment of rent, lessor does not waive right to enforce forfeiture by claiming under mortgage or by procuring receiver in foreclosure proceedings, when. See *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

FORFEITURE—

Where lease forfeited for nonpayment of rent, lessor does not waive right to enforce forfeiture by claiming under mortgage,

Forfeiture—General Code.

FORFEITURE—Continued.

by demanding judgment for accrued rent or by procuring receiver in foreclosure proceedings, when. See *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

FORMER JEOPARDY—

Plea does not lie where verdict of not guilty directed by court because prior indictment fatally defective. See *Sigourney v. State*, 156.

FRAUD—

Prejudicial error to fail to charge jury as to defense of fraud and burden of proof, when. See *Klein & Heffelman Co. v. Peterman*, 145.

Discretion of joint district tuberculosis hospital board cannot be controlled by courts, when. See *State, ex rel., v. Brenner*, 209.

FREIGHT RATES—

Shipper and carrier bound by rates filed under interstate commerce act—Liability of shipper after payment of misquoted rate. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

FUNDS—

Sufficiency of allegations that funds available in county treasury to pay claim sued on. See *Nussdorfer v. State, ex rel. Miller*, 121.

GAS MAINS—

Railroad company not liable for cost of relocation of gas mains necessitated by change of grade of vacated street, when. See *C., N. O. & T. P. Ry. Co. v. Union Gas & Elec. Co.*, 213.

GENERAL CODE—

Clerk of county commissioners, appointed under Section 2409, not a county officer. See *State, ex rel., v. Commissioners*, 440. Sections 3016 and 4581 do not definitely fix fees of chief of police for services in state cases in police court. See *Haserodt v. State, ex rel.*, 354.

Special assessments may be enjoined under Section 12075, although no complaint filed under Section 3848. See *Kelly v. Cincinnati*, 466.

General Code—Gifts.

GENERAL CODE—Continued.

City engineer employed by board of rapid transit commissioners, under Section 4000-18 (106 O. L., 286), not entitled to additional compensation, when. See *Rogers v. Cincinnati*, 218.

In absence of procedure under Sections 4688 and 4688-1 county board of education may dissolve two village districts and consolidate them, when. See *Fisher v. Whittus et al.*, 415.

Defense that note without consideration because executed, without interest, in payment of life insurance policy, and violates Section 9404, forbidding rebates. See *McDonald & Frasier v. Schervish*, 88.

Under Section 10361, final judgment of justice of peace may be reviewed on weight of evidence, when. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

Sections 11343-1 and 11343-2, making publication of administrative, legislative and judicial proceedings privileged, are constitutional. See *Heimlich v. Dispatch Ptg. Co.*, 394.

Special assessments may be enjoined under Section 12075, although no complaint filed under Section 3848. See *Kelly v. Cincinnati*, 466.

Petition in error, to review conviction for unlawful sale of intoxicating liquors, cannot be filed without leave of court of appeals—Section 13246. See *Moorey v. State*, 462.

Failure to give copy of obscene photograph or excuse omission from indictment, within curative provisions of Section 13581, and not reversible error, when. See *Charville v. State*, 236.

GIFTS—

Inter vivos—Certificates of stock—Subscribed and delivered to donee but not endorsed by donor—Effect of donor receiving dividends—A father, residing in Mount Vernon, in consideration of love and affection, executed and delivered to his daughter four years before his death a written assignment of a large portion of his personal estate, consisting of stocks and securities and other property, including 230 shares of stock of The Western Union Telegraph Company, and caused her name to be written on the back of the certificates of stock as assignee thereof, and the certificates were found in her possession at her home in Washington, D. C., after his death, but he had omitted to attach his signature to the transfer on the back of the stock certificates. *Held*: First, That the gift was complete notwithstanding the omission of the donor's signa-

Gifts—Highways.

GIFTS—Continued.

ture on the back of the certificates. Second, The receipt by the father of some of the dividends declared after the execution and delivery of the instrument of transfer is not, in view of the affectionate relations existing between the parties, so inconsistent as to impeach the gift. *Ewalt, Admr., v. Ames et al.*, 374.

GOOD FAITH—

Bad faith not shown by averments of petition to recover from indemnity company difference between employe's verdict and proposed settlement with employer. See *Wire Spring Co. v. Assurance Corp.*, 344.

GRADING—

Proper subject for special assessment. See *Kelly v. Cincinnati*, 466.

GUARDIANSHIP—

Right of action against guardian—Contract for services to ward or estate—Where the guardian of a minor contracts with a third person for services to be rendered in behalf of such ward or his estate, and such services are rendered, such third person cannot maintain an action at law to recover for such services against the guardian in his representative capacity. *Payne v. Rech, Gdn.*, 327.

HABEAS CORPUS—

Writ not one of error—If the court has jurisdiction of a cause and proceeds irregularly or in an erroneous manner, the remedy is not *habeas corpus*, but proceedings in error. *In re Whallon*, 80.

HIGHWAYS—

Question for jury whether barricaded highway is a closed road, when. See *Gregg et al. v. Clapham et al.*, 363.

Failure to give land owner notice of establishment of public county road, does not invalidate proceedings for laying out road, when. See *Harkness & Cowing Co. v. St. Bernard*, 369.

Homestead Exemptions—Imprisonment.

HOMESTEAD EXEMPTIONS—

Doctrine that concealment defeats claimant's exemption in lieu of homestead, inapplicable in proceedings in aid of execution, when. See *Bolan v. Mitchell Brick Co.*, 166.

HOSPITALS—

District tuberculosis hospital act is constitutional—Discretion of board cannot be controlled by courts, when—Construction of hospital not a nuisance *per se*, when. See *State, ex rel., v. Brenner*, 200.

HUSBAND AND WIFE—

Judgment for alimony relates back to date of filing petition and allowance of restraining order against lands, and defeats lien of another judgment, when. See *Loan & Bldg. Co. v. Concrete Co.*, 48.

No constitutional right violated by imprisonment for contempt for failure to pay alimony judgment—Presumption that defendant failed to prove inability to pay alimony. See *In re Whallon*, 80.

Second wife entitled to proceeds of policy as against children of first wife, where insurance payable to wife of insured, when. See *Sherry v. Life & Accident Assn.*, 228.

Court of appeals has jurisdiction to vacate or modify alimony judgment rendered by circuit court, when. See *Graff v. Graff*, 260.

Divorce decree cannot be reviewed by appeal or error—Validity of marriage may be challenged on review of alimony proceedings, when—Evidence of prior marriage competent, when. See *Pappalardo et al. v. Pappalardo*, 291.

A wife who survives devisee, but dies before conditional devise operative, not entitled to dower, when. See *Parthe et al. v. Parthe et al.*, 317.

One indicted for failure to support his two children may be convicted as to one and acquitted as to the other, when. See *Baker v. State*, 339.

IMPRISONMENT—

No constitutional right violated by imprisonment for contempt for failure to pay alimony judgment. See *In re Whallon*, 80.

Improvements—Injunction.

IMPROVEMENTS—

Injunction lies against improvement or repair of sidewalk authorized by council, when. See *Thompson v. Cincinnati*, 420.
Assessment defeated where council fails to pass resolution of necessity—Special street assessments—Grading—Benefits—Commingleing of plans—Remedy of property owner. See *Kelly v. Cincinnati*, 466.

IMPUTED KNOWLEDGE—

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgment, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

IMPUTED NEGLIGENCE—

Not error to refuse to charge as to imputed negligence, when. See *Gregg et al. v. Clapham et al.*, 363.

INDEMNITY INSURANCE—

Bad faith not shown by averments of petition to recover from indemnity company difference between employee's verdict and proposed settlement with employer. See *Wire Spring Co. v. Assurance Corp.*, 344.

INDICTMENT—

Plea of former jeopardy does not lie where verdict of not guilty directed by court because prior indictment fatally defective. See *Sigourney v. State*, 156.

Failure to give copy of obscene photograph or excuse omission from indictment, within curative provisions of Section 13581, General Code, and not reversible error, when. See *Charville v. State*, 236.

One indicted for failure to support his two children may be convicted as to one and acquitted as to the other, when. See *Baker v. State*, 339.

INJUNCTION—

Facts necessary for relief—Before one can be entitled to invoke the aid of a court of equity by the extraordinary remedy of injunction, something more than an irregularity, or illegality in procedure, or arbitrary official action, must be shown. There

Injunction—Instructions to Jury.

INJUNCTION—Continued.

- must be a wrong, an injustice or an irreparable injury for which the law provides no adequate remedy; otherwise no relief can be granted. *Helmers et al. v. McCarthy et al.*, 423.
- Judgment for alimony relates back to date of filing petition and allowance of restraining order against lands, and defeats lien of another judgment, when. See *Loan & Bldg. Co. v. Concrete Co.*, 43.
- Question of title cannot be raised by injunction, when. See *Harlan v. Veidt*, 45.
- Degree of proof to sustain injunction against special street assessments. See *Cincinnati Ice Co. v. Cincinnati*, 109.
- Injunction lies where land owner not made party to condemnation proceedings or has not received compensation, when. See *State, ex rel., v. Brenner*, 209.
- Injunction lies against improvement or repair of sidewalk authorized by council, when. See *Thompson v. Cincinnati*, 420.
- Legal remedies must be exhausted before injunction lies against illegal taxation. See *Helmers et al. v. McCarthy et al.*, 423.
- Discretion of county commissioners will not be interfered with by injunction, when. See *State, ex rel., v. Commissioners*, 440.
- Special assessments may be enjoined under Section 12075, General Code, although no complaint filed under Section 3848, General Code. See *Kelly v. Cincinnati*, 466.

INSTRUCTIONS TO JURY—

- Charge to jury in action for damages by one injured when about to board car—Effect of incorporating entire petition in charge. See *Cincinnati Traction Co. v. Weber*, 17.
- Charge to jury as to comparative negligence, apportionment of damages and assumption of risk of stumbling over necessary parts of machine. See *Reeves Bros. Co. v. Cochli*, 32.
- Slightest evidence precludes court from charging jury as to want of evidence of material fact—Injury as cause of appendicitis. See *Cincinnati Traction Co. v. Frank*, 112.
- Prejudicial error to fail to charge jury as to defenses of want and failure of consideration, fraud and burden of proof, when. See *Klein & Heffelman Co. v. Peterman*, 145.
- Charge to jury as to speed of motorcycle which collided with barricade in road undergoing repairs—Imputed negligence. See *Gregg et al. v. Clapham et al.*, 363.

Instructions to Jury—Insurance.

INSTRUCTIONS TO JURY—Continued.

Reviewing court will not reverse where jury was properly charged as to whether release or settlement was bar to action for damages, when. See *O'Grady v. City of Newark*, 388.

INSURANCE—

1. *Inducements to insure—Rebates—Note without interest—Section 9404, General Code—Negotiable instruments—Consideration—Suit on note*—Where the evidence is to the effect that a contract was entered into for a policy of life insurance and the amount of the premium agreed upon, and thereafter a note was accepted from the insured for the first year's premium, due in sixty days without interest, the accommodation thus extended as to the time for paying the first premium cannot be regarded as an inducement for taking out the policy, or as within the inhibition of Section 9404, General Code; and where the insured made no complaint until after the note had become due and the agents receiving it had paid the premium to the insurance company, the defense that the note was void because in contravention to said section does not lie. *McDonald & Frasier v. Schervish*, 88.
2. *Designation of beneficiary—Proceeds payable to wife—Death of first wife, leaving children—Second wife entitled to proceeds, when—Mutual benefit societies*—Where insurance is taken in a benevolent organization, payable to the wife of the insured or his lawful heirs, and subsequent to the death of the said wife and the remarriage of the insured the said policy was taken up and two new policies issued in its stead, without change with reference to the beneficiary, the proceeds of said policies become, at the death of the insured, the property of the second wife, and no part thereof is payable to the children of the first wife. *Sherry v. Life & Accident Assn.*, 228.
3. *Construed against person preparing*—Where the meaning of a written instrument is not clear, it will be construed most strongly against the person who prepared it. *Machine Tool Co. v. Fire Ins. Co.*, 313.
4. *Fire insurance policy—Reformation—Description of risk*—Where through mistake, fraud or inadvertence, the agent of an insurance company fails to insert in a policy of fire insurance a proper description of the location of the risk, the court will reform the policy to make such description correspond with the intention of the parties. *Ib.*

Insurance—Interstate Commerce.

INSURANCE—Continued.

5. *Indemnity insurance—Good faith by insurer—Negotiations for settlement with employe of insured*—An indemnity insurance company issuing policies to indemnify the assured in a fixed maximum sum against loss by reason of liability which may be imposed by law on the assured if any of its employes accidentally suffer injuries within the provisions of the policy, owes to the assured the duty of exercising good faith under its contract of indemnity and in negotiations for the settlement of legal proceedings brought by injured employes. *Wire Spring Co. v. Assurance Corp.*, 344.

6. *Indemnity insurance—Action for difference between verdict and proposed settlement—Facts pleaded insufficient to show bad faith*—Where a policy for \$5,000 contains a provision that no action shall lie against the indemnity company for any loss under the policy unless brought by the assured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue, and the petition in an action by the assured against the indemnity company avers that the assured had been sued for a sum much greater than the face of the policy by an employe injured in its service; and the petition further avers that while the action was pending the assured and the indemnity company made every effort to settle with the insured employe and his attorney for a reasonable amount, but that \$7,500 was the best proposition that could be obtained; that the assured offered to pay \$2,500 of this amount but the indemnity company refused to pay more than \$3,500, although stating that the conditions were such that in all probability a verdict of \$10,000 or more would be rendered against the assured, which facts the petition alleged constituted bad faith; and that the case was not settled but proceeded to trial and resulted in a verdict and judgment in favor of the employe for \$20,000 which was paid by the assured, the averments of fact do not show bad faith on the part of the indemnity company nor state facts which render it liable for the difference between the amount paid in satisfaction of the judgment and the amount for which the action could have been settled. *Ib.*

INTERSTATE COMMERCE—

Shipper and carrier bound by rates filed under interstate commerce act—Liability of shipper after payment of misquoted rate. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

Interurbans—Jeopardy.

INTERURBANS—

Traction company not negligent in ejecting intoxicated passenger for nonpayment of fare, when. See *Simms v. Stark Elec. Ry. Co.*, 264.

INTER VIVOS GIFTS—

Inter vivos gift of certificates of stock, subscribed and delivered but not endorsed by donor, is completed, when. See *Ewalt, Admr., v. Ames et al.*, 374.

INTOXICATING LIQUORS—

1. *Error proceedings—Court of appeals—Leave to file petition—Conviction for unlawful sale*—By virtue of the requirements of Section 13246, General Code, one who has been convicted before a mayor for a violation of the law prohibiting the sale of intoxicating liquors in a city, which judgment has been affirmed by the common pleas court, must, before filing a petition in error in the court of appeals, obtain leave of that court after good cause shown therefor and within the time limited in said section. *Moorey v. State*, 462.
2. *Time for filing—Sessions and term of court*—In computing the time within which the same must be filed, the language of the statute, "When a reviewing court is not in session," means not in session in the county in which the litigation is pending, unless the court has fixed some other county of the appellate district for the hearing of such cases; and the court of appeals is not to be deemed in session in the county in which the litigation is pending simply because the term of court therein has been formally held open. *Ib.*
3. *Refusal of leave to file*—If an examination of the entire record of a case coming within that statute clearly discloses that the judgments of the lower courts are right, leave to file a petition in error will be refused. *Ib.*

ISSUES—

Jurisdiction determined by pleadings and admissions by counsel insufficient to defeat jurisdiction, when—Prohibition. See *K. & M. Ry. Co. v. Common Pleas Court*, 244.

JEOPARDY—

Directed verdict on prior indictment—Where a verdict of not guilty has been directed on the application of the defendant,

Jeopardy—Jurisdiction.

JEOPARDY—Continued.

on the ground that the indictment was fatally defective, he cannot thereafter plead former jeopardy when reindicted for the same offense. *Sigourney v. State*, 156.

JOURNAL—

Equivocal or ambiguous entry upon court docket or journal may be explained by parol evidence, when. See *James v. Hotel Honing Co.*, 162.

JUDGES—

Authority of trial judge to correct errors of judge who rules on interlocutory matters See *Pagel v. Creasy et al.*, 204.

JUDGMENTS—

Judgment for alimony relates back to date of filing petition and allowance of restraining order against lands, and defeats lien of another judgment, when. See *Loan & Bldg. Co. v. Concrete Co.*, 43.

Decree in equity case is bar and a defense to second action, when. See *Klein & Heffelman Co. v. Peterman*, 145.

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgment, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

Under Section 10361, General Code, final judgments of justice of peace may be reviewed on weight of evidence, when. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

JUDICIAL NOTICE—

Act of God—Flood of March, 1913—The flood of March, 1913, has been many times held to have been an "act of God," and in the absence of any stipulation that it was, courts in the Ohio and Miami valleys may take judicial notice to that effect. *Joslin-Schmidt Co. v. B. & O. S. W. Rd. Co.*, 193.

JURISDICTION—

1. *Cincinnati municipal court—Action against executor on rejected claim*—The municipal court of Cincinnati has jurisdiction to try and determine an action against an executor on a claim rejected by him. *Keck, Exr., v. Bahlke*, 246.

Jurisdiction—Jury.

JURISDICTION—Continued.

2. *Justice of the peace—Waiver—Defendant appears and consents to continuance*—When the subject of an action is within the jurisdiction of a justice of the peace, and the defendant without objecting to the jurisdiction of the justice of the peace over his person, appears and consents to a continuance, before the filing of a motion to dismiss for want of jurisdiction, such defendant thereby confers jurisdiction of his person upon the magistrate. *Cluxton v. Smithson*, 482.

Equity cannot be invoked where party has adequate remedy at law—Question of title cannot be raised by injunction, when. See *Harlan v. Veidt*, 45.

Inherent power and authority of courts to enforce decrees and orders by contempt proceedings. See *In re Whallon*, 80.

Jurisdiction determined by pleadings, and admissions by counsel insufficient to defeat jurisdiction, when—Prohibition. See *K. & M. Ry. Co. v. Common Pleas Court*, 244.

Judge not authorized to set aside suspended sentence after expiration of period of original sentence. See *In re Pontius*, 249.

Court of appeals has jurisdiction to vacate or modify alimony judgment rendered by circuit court, when. See *Graff v. Graff*, 260.

Question of jurisdiction on appeal from refusal of probate court to appoint administrator, cannot be raised after such appointment by common pleas court, when. See *Ewalt, Admr., v. Ames et al.*, 374.

Under Section 10361, General Code, final judgments of justice of peace may be reviewed on weight of evidence, when. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

County board of education may dissolve two village school districts and consolidate them, when. See *Fisher v. Whittus et al.*, 415.

Petition in error, to review conviction for unlawful sale of intoxicating liquors, cannot be filed without leave of court of appeals—Sessions of court and time for filing application. See *Moorey v. State*, 462.

JURY—

Degree of negligence by both employer and employe is jury question—Whether employe, who had reported for duty but

Jury—Landlord and Tenant.

JURY—Continued.

had not begun work, was acting within scope of employment is jury question. See *Cin. & Cols. Trac. Co. v. Murphy*, 1. Trial court may require special findings of facts by jury, when—Special findings control over general verdict, when. See *Simms v. Stark Elec. Ry. Co.*, 284.

JUSTICE OF PEACE—

Want of jurisdiction waived by appearing and consenting to continuance by justice of peace, when. See *Cluxton v. Smithson*, 482.

KNOWLEDGE—

Liability of owner or harbinger of dog for injuries inflicted. See *Mehmert v. Kelso*, 69.

LANDLORD AND TENANT—

1. *Extension of term—Notice by lessee unnecessary, when—*When a lease contains an option to the lessee to have the term of the lease extended, no notice of an election to have the term continued is necessary, unless it is required by the terms of the lease. *Harlan v. Veidt*, 45.
2. *Sufferance—Term of tenant—*A tenant at sufferance has no term, but is in merely by the forbearance of the landlord to act. *Ib.*
3. *Action to quiet title—Possession prerequisite, when—*Only one who is in possession of real estate may maintain an action to quiet title, unless the plaintiff claims as remainderman or reversioner. *Ib.*
4. *Title—Determined only at law—*The question of title cannot be raised in an injunction case, and is one to be determined in a court of law. *Ib.*
5. *Nonpayment of rent—Waiver of forfeiture by landlord—Asking judgment for accrued rents—And appointment of receiver—Foreclosure of mortgage—Statute of limitations—*Where a lease has been forfeited for nonpayment of rent, the lessor does not waive his right to enforce the forfeiture by filing a cross-petition setting up his claims under a mortgage, nor by demanding judgment for accrued rent, nor by procuring the appointment of a receiver in the foreclosure action, who collects the rents and holds them subject to the order of the court. *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

Landlord and Tenant—Leases.

LANDLORD AND TENANT—Continued.

6. *Renewal or extension of term—New lease unnecessary, when—Extension by conduct of lessee*—A lease for a term with a privilege or option in the tenant of a renewal or extension for a further term, upon the same terms and conditions, is a present demise as to the renewal to begin at a future time, and under such covenant no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term. *Gross v. Clauss*, 140.

7. *Holding over by lessee—Liability for renewal term*—A lease contained a provision that if the lessee should have performed all the conditions of the lease then upon its expiration the lessee should have the privilege of renewing the same for a four-year term upon the terms and conditions of the original lease. Upon the expiration of the original term the lessee remained in possession of the premises without anything being said or done by either of the parties with reference to a new lease, no notice being given by the lessee of his intention to exercise his option or privilege of a renewal. Lessee continued to occupy the premises and pay the rent for three months after the expiration of the original term. *Held*: That the lessee by continuing in possession of the premises and paying the stipulated rent without notifying the lessor of his intention not to make his election to renew, thereby bound himself for the term of four years from the date of the expiration of the original lease. *Ib.*

Liability of receiver for rent of real estate leased before receivership. See *Andrews v. Beigel, Recr.*, 427.

LEASES—

Notice by lessee of intention to extend term, not necessary, when—Term of tenant at sufferance—Possession prerequisite to action to quiet title—Injunction not proper remedy, when. See *Harlan v. Veidt*, 45.

Where lease forfeited for nonpayment of rent, lessor does not waive right to enforce forfeiture by claiming under mortgage, by demanding judgment for accrued rent or by procuring receiver in foreclosure proceedings, when. See *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

Leases—Liquors.

LEASES—Continued.

Continuing in possession after expiration of term, without express notice to lessor, renders lessee liable for rent for full renewal period, when. See *Gross v. Clauss*, 140.

Liability of receiver for rent of real estate leased before receivership. See *Andrews v. Beigel, Recr.*, 427.

LIBEL AND SLANDER—

Sections 11843-1 and 11843-2, General Code, making publication of administrative, legislative and judicial proceedings privileged, are constitutional. See *Heimlich v. Dispatch Ptg. Co.*, 394.

LIENS—

Judgment for alimony relates back to date of filing petition and allowance of restraining order against lands, and defeats lien of another judgment, when. See *Loan & Bldg. Co. v. Concrete Co.*, 43.

Real estate unnecessary for mechanic's lien to attach—Lien by vendor on machines. See *Rule v. Automatic News Co.*, 450.

LIFE INSURANCE—

Defense that note without consideration because executed, without interest, in payment of life insurance policy, and violates Section 9404, General Code, forbidding rebates. See *McDonald & Frasier v. Schervish*, 88.

Second wife entitled to proceeds of policy as against children of first wife, where insurance payable to wife of insured, when. See *Sherry v. Life & Accident Assn.*, 228.

LIMITATION OF ACTIONS—

Inapplicable to defense of fraud, when—Statutes of limitation have no application to defenses not involving set-off or counterclaim. *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

Actions for permanent or continuing trespass or nuisance, and statute of limitations. See *Louisville Brick Co. v. Calmelat*, 435.

LIQUORS—

Petition in error, to review conviction for unlawful sale of intoxicating liquors, cannot be filed without leave of court of

Liquors—Mechanics' Liens.

LIQUORS—Continued.

appeals—Sessions of court and time for filing application. See *Moorey v. State*, 462.

LIS PENDENS—

Judgment for alimony relates back to date of filing petition and allowance of restraining order against lands, and defeats lien of another judgment, when. See *Loan & Blag. Co. v. Concrete Co.*, 43.

LOITERING—

Municipal ordinance punishing vagrancy not invalid because word "loitering" used in defining offense, when. See *Bader, Supt.*, v. *McCartin*, 76.

MACHINERY—

Model of machine which injured employe, admissible in evidence, when—Error to charge jury as to assumption of risk of stumbling over necessary parts of machine, when. See *Reeves Bros. Co. v. Cochli*, 82.

Injuries received from coffee mill are result of accident, and not from operation of dangerous machine, when. See *P. & C. Schneider Co. v. Wagner*, 232.

Seller may have mechanic's lien on machine sold, when. See *Rule v. Automatic News Co.*, 450.

MALICIOUS PROSECUTION—

In an action for malicious prosecution, parol evidence admissible to explain entry as to plaintiff's discharge in criminal prosecution, when. See *James v. Hotel Honing Co.*, 162.

MASTER AND SERVANT—

Receipt of award from workmen's compensation fund not bar to action by employe against joint tort-feasor, when. See *Ohio Trac. Co. v. Washington*, 273.

MECHANICS' LIENS—

1. *Effective against personality, when*—It is not necessary in order for a mechanic's lien to be effective that there must be real estate of the lien debtor to which it can attach. *Rule v. Automatic News Co.*, 450.

Mechanics' Liens—Motor Vehicles.

MECHANICS' LIENS—Continued.

2. *Machines—Lien of seller*—Where machines are sold for and used in erecting, altering or repairing a manufactory of the purchaser, and such machines are not attached or fastened to the building or land in such a way as to make them permanent fixtures, the seller has a mechanic's lien upon such machines. *Ib.*

MEMORANDUM—

Memorandum made by witness after event took place and concerning which his memory is extinguished, is inadmissible, when. See *Cincinnati Traction Co. v. Hackett*, 97.

MINORS—

One indicted for failure to support his two children may be convicted as to one and acquitted as to the other, when. See *Baker v. State*, 339.

MODELS—

Model of machine which injured employe, admissible in evidence, when. See *Reeves Bros. Co. v. Cochli*, 32.

MONOPOLIES—

Public policy—Restraint of trade—Limited-agency contract—Sherman anti-trust law—Effect of withholding title—No violation of law where agent has right only to solicit purchasers—The Ford Motor Company in its limited-agency contract withholds to itself the title in the machine, and the agent has the right only to solicit purchasers, and no right to give complete title to the purchaser except by bill of sale signed by the Ford Motor Company, and its sales are made through its own agents under the contract, and it is protected in so directly selling by its patents, and its contract is not monopolistic, in restraint of trade, or in violation of the Sherman anti-trust law, or against public policy. *Orebaugh v. Neu*, 404.

MOTOR VEHICLES—

Charge to jury as to speed of motorcycle which collided with barricade in road undergoing repairs—Imputed negligence. See *Gregg et al. v. Clapham et al.*, 363.

Moving Pictures—Municipal Corporations.

MOVING PICTURES—

Reviewing court may require reproduction of film attached as exhibit to bill of exceptions, when. See *Duncan, Recr.*, v. *Kiger*, 57.

MUNICIPAL CORPORATIONS—

1. *Vagrants—Loitering—Habeas corpus—City ordinance—Powers of municipalities—Validity of ordinance defining and punishing vagrancy*—While cities are without authority to punish loiterers as such, they have ample authority to punish vagrants, and an ordinance passed in the exercise of such power is not invalid because the word "loitering" is used in defining the offense, and in creating the class of vagrants contemplated. *Bader, Supt.*, v. *McCartin*, 76.

2. *Damages—Grading and construction of sidewalks—Change of street grade—Proof necessary to sustain action*—In an action against a municipality for damages for change of grade in a street, the plaintiff must show either that his buildings were constructed in accordance with a grade regularly established, either by ordinance or user, and that the improvement of the street had been made to a different grade and damages caused thereby; or that while no grade was then established, the buildings were originally erected to conform to what would be a reasonable grade for the unimproved street when it should be improved, and that instead of establishing such reasonable grade the city authorities had adopted one entirely unreasonable. *Middletown v. Doty*, 333.

Cause of action not stated by petition alleging injuries caused by slipping on 10-inch inclined sidewalk covered with ice, when. See *Ritter v. City of Toledo*, 72.

Railroad company not liable for cost of relocation of gas mains necessitated by change of grade of vacated street, when. See *C., N. O. & T. P. Ry. Co. v. Union Gas & Elec. Co.*, 213.

City engineer employed by board of rapid transit commissioners, under Section 4000-18, General Code (106 O. L., 286), not entitled to additional compensation, when. See *Rogers v. Cincinnati*, 218.

Injunction lies against improvement or repair of sidewalk authorized by council, when. See *Thompson v. Cincinnati*, 420.

Municipal Corporations—Negligence.

MUNICIPAL CORPORATIONS—Continued.

Assessment defeated where council fails to pass resolution of necessity—Special street assessments—Grading—Benefits—Commingleing of plans—Remedy of property owner. See *Kelly v. Cincinnati*, 466.

MUNICIPAL COURT OF CINCINNATI—

Jurisdiction of action against executor on claim rejected by him. See *Keck, Exr., v. Bahlke*, 246.

MUTUAL BENEFIT SOCIETIES—

Second wife entitled to proceeds of policy as against children of first wife, where insurance payable to wife of insured, when. See *Sherry v. Life & Accident Assn.*, 228.

NEGLIGENCE—

1. *Comparative negligence—Jury question*—When the evidence establishes the negligence of an employer, and the circumstances of the death of an employe show negligence on the part of the deceased, the question of the degree of negligence of each becomes one for the jury under proper instructions from the court. *Cin. & Cols. Trac. Co. v. Murphy*, 1.
2. *Course of employment—Scope of duties—Jury question*—Where an employe reported for duty at the usual time, was at the place where during working hours his work for the day was to be performed, and came in contact with the wires which caused his death by electrocution within less than ten feet of the machine upon which he was to work as soon as the foreman finished his breakfast, it cannot be said as a matter of law that he was not acting at the time within the scope of his employment. The question is one of fact to be submitted to the jury under proper instructions from the court. *Ib.*
3. *Presumptions—Freedom from negligence*—In a suit by an administrator of a deceased employe for damages on account of the alleged negligence of the employer, which negligence it is charged caused such death, the law presumes at the outset of the case that both parties are free from negligence. *Ib.*
4. *Charge to jury—Passenger on street car, who is*—One is a passenger in a street car who is in the act of stepping on the step or platform, the car having stopped for him; and in case of an accident when stepping on, his rights are those

Negligence.

NEGLIGENCE—Continued.

- of a passenger. In an action for damages on account of personal injuries due to the sudden starting of a street car under such circumstances, it is not error for the trial court to refuse to incorporate in the charge to the jury a statement that to warrant a finding that the plaintiff was a passenger the jury must find that the conductor knew, or by the exercise of ordinary care should have known, that the plaintiff was about to board the car while it was at a standstill. *Cincinnati Traction Co. v. Weber*, 17.
5. *Charge to jury—Effect of incorporating petition therein*—It is not error for the court to read to the jury the entire petition, which petition sets forth an element of damage not supported by any evidence, where the court, in the portion of the charge which followed the reading of the pleadings, did not make any allusion to the element of damage which was unsupported by evidence, but on the contrary mentioned the different elements of damage which would go to make up the verdict of the jury in case they should find in favor of the plaintiff. *Ib.*
6. *Evidence—Model of machine admissible, when*—In an action by an employe on account of injuries received, it is competent to offer in evidence for illustrative purposes a model substantially representing the main parts of the machine in which he was injured. *Reeves Bros. Co. v. Cochli*, 32.
7. *Comparative negligence—Charge to jury*—The law is correctly given in an instruction to the jury as to comparative negligence which states that if they find from a preponderance of the evidence that the negligence of the plaintiff was slight and by a like preponderance of the evidence that the negligence of the defendant was gross, and all the disputed matters are found in favor of the plaintiff, the damages suffered by plaintiff, if any, will then be compared and apportioned between the plaintiff and defendant in the ratio of their respective contributions of negligence to the combined negligence, and plaintiff's recovery, if any, will be diminished in accordance with the ratio thus fixed and determined. *Ib.*
8. *Assumption of risk—Charge to jury*—An instruction to the jury which declares as a matter of law that plaintiff assumes the risk of stumbling over or otherwise coming in contact with a necessary part of the machine which he is operating, renders nugatory the present statutory provision as to the negligence of the employer. *Ib.*

Negligence.

NEGLIGENCE—Continued.

9. *Municipal corporations—Sidewalk not defective, when*—A petition to recover damages for personal injuries caused by slipping on an icy sidewalk, where the only complaint made against the walk is that it has an incline of ten inches in seven feet, and was covered with ice produced by natural causes, does not state a cause of action. *Ritter v. City of Toledo*, 72.
10. *Proximate cause of accident—Use of chain-driven automobile truck*—Plaintiff was employed by defendant in loading brick upon an automobile truck at one point and unloading same at another point, and with other men similarly engaged was permitted to ride on the truck. While so riding he sat with his feet hanging over the side and directly over the sprocket wheel and chain by which the truck was propelled. The truck was driven near an approaching wagon, and, fearing for his safety, plaintiff instinctively drew back his leg, which was thereby caught in the sprocket and chain and crushed so that amputation was necessary. The evidence showed that seventy per cent. of all automobile trucks are chain driven, and that the sprocket and chain are in all makes exposed and uncovered. Plaintiff had a choice of position upon the truck and there was ample opportunity for him to have placed himself where he would have been in no danger whatever from the sprocket wheel and chain. *Held*: That no negligence can be attributed to defendant from the use of such chain-driven automobile truck, and that the proximate cause of the plaintiff's injury was his own act in placing himself upon the truck at such point as to be in danger. *Farrell v. Roche-Bruner Building Co.*, 93.
11. *Sudden starting of street car—Company guilty of negligence, when*—If a street car stops and a passenger is attempting to alight from the car, and while in the act of alighting the agent of the company in charge of the car suddenly puts it in motion without giving the passenger sufficient time to alight, and by reason of such starting of the car the passenger is injured, then the company is guilty of negligence. *Cincinnati Traction Co. v. Frank*, 112.
12. *Passenger given wrong transfer—Second conductor ejects passenger—Liability of company to passenger*—A passenger on a street car who has paid his fare and is entitled to ride over another line of the same company, and who, having asked for

Negligence.

NEGLIGENCE—Continued.

a transfer over such other line, is given, by mistake of the conductor, a transfer not properly punched as to time, may nevertheless, if he has exercised ordinary care and prudence about the receiving and making use of such transfer, lawfully insist upon being carried over such other line without further payment of fare; and if such passenger, without fault on his part, is ejected from a car for refusing to pay fare other than by such transfer, he may recover damages for the tort and cannot be restricted to damages for breach of the contract to carry him. *Diehl v. Cincinnati Traction Co.*, 151.

13. *Accident—Ordinary care—Dangerous machine—Contributory negligence*—A company operating a grocery used therein a large coffee-mill which was operated by hand. Upon the side of this coffee-mill was a large flywheel to the rim of which was attached a handle. Between the end of this handle and the wall or shelving there was a space of 17½ inches. Some employee who had used this mill had left the wheel in motion, and a clerk while in the performance of her duties and while passing through the space above described was struck by the revolving handle and severely injured. *Held*: That the company was not guilty of negligence and therefore not liable to respond in damages to the clerk. In law's domain the occurrence must be regarded as an accident for which no one is answerable and for which no remedy is provided. *P. & C. Schneider Co. v. Wagner*, 232.

14. *Carriers—Ejecting intoxicated passenger—Nonpayment of fare*—A railroad company operating its cars by electricity in the open country is not negligent in requiring an intoxicated man to leave its car in the night time, for the nonpayment of his fare, at a regular stop for the discharging and receiving of passengers on a public highway, when he, although noticeably intoxicated, was able to walk and talk intelligently. *Simms v. Stark Elec. Ry. Co.*, 264.

15. *Road barricaded during improvement—Charge to jury—Speed of motorcycle—Injury to motorcyclist*—In an action for injuries resulting from a motorcycle colliding with an obstruction in the road, placed there by contractors as a barricade while the road was being improved, it is not error to charge the jury that if the machine "was being driven at a higher rate of speed than twenty miles an hour at the time of the

Negligence.

NEGLIGENCE—Continued.

accident, then the boys so riding and driving the machine were violating the laws of Ohio, and such act would be evidence of negligence on their part, and should be considered by you upon the question of contributory negligence." *Gregg et al. v. Clapham et al.*, 363.

16. *Imputed negligence—Charge to jury*—Nor is it error to refuse to charge that "if you find from the evidence that the witness, Beaver, in the management of the motorcycle, did not use ordinary care, and that his want of ordinary care was the proximate cause of Leon Clapham's injuries, then the said Leon Clapham is charged with the negligence of said Beaver, and there can be no recovery in this action." *Ib.*
 17. *Whether road closed—Question for jury*—Whether or not the barricade which had been placed across the road made it a closed road was a question of fact for the jury, to be determined in the light of the surrounding circumstances and the law applicable to the case. *Ib.*
 18. *Railroads—Ordinary care—Person assisting passenger entering car*—In the absence of a rule of the company or the existence of a custom permitting persons to enter its car when stopping to receive passengers, for the purpose of assisting passengers with children or baggage, a railway company, operating street cars by electricity over the streets of a city, is only required to exercise towards such persons ordinary care, after becoming aware of their presence within the car. *Mahoning Val. Ry. Co. v. Gors*, 474.
 19. *Notice of presence in car*—Such railway company is chargeable with notice of the presence of such persons within its car, not only when those in charge of the car have actual notice, but, when, in the exercise of ordinary care, they should have notice of their presence. *Ib.*
 20. *Ordinary care—Notice*—Ordinary care charges such railway company with notice of whatever those in charge of the car should know in the proper discharge of their duties in the operation of such car. *Ib.*
- Warehouseman liable where his negligence commingled with act of God to produce damage to goods, but excused for failure to exercise ordinary care, when. See *B. & O. S. W. Rd. Co. v. Wuest*, 127.

Negligence—Newspapers.

NEGLIGENCE—Continued.

Receipt of award from workmen's compensation fund not bar to action by employe against joint tort-feasor, when. See *Ohio Trac. Co. v. Washington*, 273.

Bad faith not shown by averments of petition to recover from indemnity company difference between employe's verdict and proposed settlement with employer. See *Wire Spring Co. v. Assurance Corp.*, 344.

Release from damages admissible in evidence, but sufficiency and weight are jury question—Charge to jury as to release being bar to action. See *O'Grady v. City of Newark*, 388.

NEGOTIABLE INSTRUMENTS—

Defenses distinguished—Want and failure of consideration—Fraud—Charge to jury—Where the defenses of want of consideration and failure of consideration and fraud are interposed, failure to instruct the jury fully as to each of these defenses and the burden of proof with reference to each constitutes prejudicial error. *Klein & Heffelman Co. v. Peterman*, 145.

Defense does not lie that note without consideration because executed, without interest, in payment of life insurance policy, and therefore violates Section 9404, General Code, forbidding rebates. See *McDonald & Frasier v. Schervish*, 88.

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgment, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

NEWLY-DISCOVERED EVIDENCE—

Concealment of X-ray plate not sufficient to justify sustaining petition for new trial on ground of newly-discovered evidence, when. See *Duncan, Recr., v. Kiger*, 57.

NEWSPAPERS—

Sections 11343-1 and 11343-2, General Code, making publication of administrative, legislative and judicial proceedings privileged, are constitutional. See *Heimlich v. Dispatch Ptg. Co.*, 394.

Newspaper publication sufficient notice of action by taxing authorities, when. See *Helmert et al. v. McCarthy et al.*, 423.

New Trial—Notice.

NEW TRIAL—

Concealment of X-ray plate not sufficient to justify sustaining petition for new trial on ground of newly-discovered evidence, when. See *Duncan, Recr., v. Kiger*, 57.

NONANCESTRAL PROPERTY—

Realty acquired by payment of sum stipulated in will creates estate by purchase and not by devise, when. See *Beight v. Organ et al.*, 281.

NOTARY PUBLIC—

Commissioner appointed by court of another state to take depositions, may commit witness for contempt, when. See *Schott v. Benckenstein*, 68.

NOTES—

Defense does not lie that note without consideration because executed, without interest, in payment of life insurance policy, and therefore violates Section 9404, General Code, forbidding rebates. See *McDonald & Frasier v. Schervish*, 88.

Prejudicial error to fail to charge jury as to defenses of want and failure of consideration, fraud and burden of proof, when. See *Klein & Heffelman Co. v. Peterman*, 145.

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgment, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

NOTICE—

Notice by lessee of intention to extend term under lease not necessary, when. See *Harlan v. Veidt*, 45.

Continuing in possession after expiration of term, without express notice to lessor, renders lessee liable for rent for full renewal period, when. See *Gross v. Clauss*, 140.

Failure to give land owner notice of establishment of public county road, does not invalidate proceedings for laying out road, when. See *Harkness & Cowing Co. v. St. Bernard*, 369.

Shipper charged with notice of published tariff rates and liable therefor, although charges paid on misquoted rates. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

Newspaper publication sufficient notice of action by taxing authorities, when. See *Helmets et al. v. McCarthy et al.*, 423.

Notice—Office and Officer.

NOTICE—Continued.

Railroad charged with notice of presence in car of person assisting passenger to enter—Ordinary care. See *Mahoning Val. Ry. Co. v. Gora*, 474.

NUISANCES—

1. *Permanent—Statutes of limitations*—Under the doctrine of permanent trespass or nuisance, for which but one action lies, and for which damages may be awarded *in solido*, when a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass. *Louisville Brick Co. v. Calmelat*, 435.
2. *Permanent or continuing—Actions*—Where an owner of land rightly and lawfully does an act entirely on his own land, and by means of such act puts in action, or directs a force against, or upon, or that affects, another's land, without such other's consent or permission, such owner or actor is liable to such other for the damages thereby so caused the latter, and at once the cause of action accrues for such damages; and such force, if so continued, is continued by an act of such owner or actor, and may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him and is an additional cause of action; and until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action *Ib*.

Location and construction of tuberculosis hospital not a nuisance *per se*, when. See *State, ex rel., v. Brenner*, 209.

OBSCENE PHOTOGRAPHS—

Failure to give copy of obscene photograph or excuse omission from indictment, within curative provisions of Section 13581, General Code, and not reversible error, when. See *Charville v. State*, 236.

OFFICE AND OFFICER—

Additional compensation—Additional duties—A public officer cannot receive any additional compensation by reason of the fact that additional duties are imposed on him or assumed by him,

Office and Officer—Ordinary Care.

OFFICE AND OFFICER—Continued.

- unless the legislature has expressly provided that such additional compensation may be paid. *Rogers v. Cincinnati*, 218.
- Proceedings not invalid because township trustee, as individual land owner, signed petition for ditch improvement, when. See *Trustees of Wilson Tp. v. Gilbert*, 39.
- Commissioner appointed by court of another state to take depositions, may commit witness for contempt, when. See *Schott v. Benckenstein*, 63.
- Deputy state supervisors of elections entitled to compensation according to number of elections, when. See *Nussdorfer v. State, ex rel. Miller*, 121.
- Discretion of joint district tuberculosis hospital board cannot be controlled by courts, when. See *State, ex rel., v. Brenner*, 209.
- City engineer employed by board of rapid transit commissioners, under Section 4000-18, General Code (106 O. L., 286), not entitled to additional compensation, when. See *Rogers v. Cincinnati*, 218.
- Chief of police not entitled to fees for services in state cases in police court, when. See *Haserodt v. State, ex rel.*, 354.
- County board of education may dissolve two village school districts and consolidate them, when. See *Fisher v. Whittus et al.*, 415.
- Failure to file complaint against tax value not excused because board overworked. See *Helmert et al. v. McCarthy et al.*, 423.
- Technical precision not required of records of county commissioners—Discretion will not be interfered with by injunction, when—Clerk not a county officer. See *State, ex rel., v. Commissioners*, 440.

ORDINANCES—

- Municipal ordinance punishing vagrancy not invalid because word "loitering" used in defining offense, when. See *Bader, Supt., v. McCartin*, 76.

ORDINARY CARE—

- Warehouseman excused for failure to exercise ordinary care, by act of God, when. See *B. & O. S. W. Rd. Co. v. Wuest*, 127.

Ordinary Care—Partnership.

ORDINARY CARE—Continued.

Injuries received from coffee mill are result of accident, and not from operation of dangerous machine, when. See *P. & C. Schneider Co. v. Wagner*, 232.

Railroads required to exercise ordinary care toward person assisting passenger entering car—Notice of presence of person in car. See *Mahoning Val. Ry. Co. v. Gors*, 474.

PARENT AND CHILD—

One indicted for failure to support his two children may be convicted as to one and acquitted as to the other, when. See *Baker v. State*, 339.

PAROL EVIDENCE—

Equivocal or ambiguous entry upon court docket or journal may be explained by parol evidence, when. See *James v. Hotel Honing Co.*, 162.

In action on judgment, parol evidence admissible to show that partnership misdescribed as a corporation, when. See *Jackson v. Foundry & Machine Co.*, 171.

PARTIES—

In action on judgment, parol evidence admissible to show that partnership misdescribed as a corporation, when. See *Jackson v. Foundry & Machine Co.*, 171.

Injunction lies where land owner not made party to condemnation proceedings or has not received compensation, when. See *State, ex rel., v. Brenner*, 209.

PARTITION—

Realty acquired by payment of sum stipulated in will creates estate by purchase and not by devise, when. See *Beight v. Organ et al.*, 281.

Evidence required to engraft trust on land, under claim for funds advanced toward joint purchase. See *Wagner v. Wagner et al.*, 297.

PARTNERSHIP—

In action on judgment, parol evidence admissible to show that partnership misdescribed as a corporation, when. See *Jackson v. Foundry & Machine Co.*, 171.

Passengers—Photographs.

PASSENGERS—

One in act of boarding car is a passenger and entitled to recover damages for injuries, when. See *Cincinnati Traction Co. v. Weber*, 17.

Traction company not negligent in ejecting intoxicated passenger for nonpayment of fare, when. See *Simms v. Stark Elec. Ry. Co.*, 264.

Railroads required to exercise ordinary care toward person assisting passenger entering car—Notice of presence of person in car. See *Mahoning Val. Ry. Co. v. Gors*, 474.

PAYMENT—

Acceptance of check endorsed "In settlement in full of account" constitutes accord and satisfaction, defeating action by creditor, when. See *Bettman et al. v. Sporbin et al.*, 28.

PER CAPITA—

Per capita distribution favored where testator leaves undetermined the proportions in which beneficiaries to take—Devise to children of two daughters of testator. See *Broermann, Jr., v. Kessling*, 7.

PERMANENT TRESPASS—

Actions for permanent or continuing trespass or nuisance, and statute of limitations. See *Louisville Brick Co. v. Calmelat*, 435.

PERSONAL PROPERTY—

Seller may have mechanic's lien on machine sold, when. See *Rule v. Automatic News Co.*, 450.

PETITION—

Not error to incorporate entire petition in charge to jury, when. See *Cincinnati Traction Co. v. Weber*, 17.

PHOTOGRAPHS—

Failure to give copy of obscene photograph or excuse omission from indictment, within curative provisions of Section 13581, General Code, and not reversible error, when. See *Chorville v. State*, 236.

Pleading—Presumptions.

PLEADING—

Sufficiency of allegations—Funds available to pay claim against county—In an action based on a claim against a county, the allegation that there is money in the hands of the county treasurer, to the credit of the proper fund and not otherwise appropriated, sufficient to satisfy the claim in suit, meets the requirement of the case without adding that it has been appropriated by the county commissioners for payment of the particular claim in question. *Nussdorfer v. State, ex rel. Miller*, 121.

Not error to incorporate entire petition in charge to jury, when. See *Cincinnati Traction Co. v. Weber*, 17.

Cause of action against municipality not stated by petition alleging injuries caused by slipping on 10-inch inclined sidewalk covered with ice, when. See *Ritter v. City of Toledo*, 72.

Judgment not invalidated because averments of petition insufficient as to partnership, when. See *Jackson v. Foundry & Machine Co.*, 171.

Affidavit in replevin may be verified by agent or attorney of plaintiff—Sections 11358 and 12052, General Code. See *Smith v. Feasley*, 242.

Jurisdiction determined by pleadings, and admissions by counsel insufficient to defeat jurisdiction, when—Prohibition. See *K. & M. Ry. Co. v. Common Pleas Court*, 244.

Bad faith not shown by averments of petition to recover from indemnity company difference between employe's verdict and proposed settlement with employer. See *Wire Spring Co. v. Assurance Corp.*, 344.

POSSESSION—

Continuing in possession after expiration of term, without express notice to lessor, renders lessee liable for rent for full renewal period, when. See *Gross v. Clauss*, 140.

PRESUMPTIONS—

Presumption obtains at outset of case that both parties free from negligence. See *Cin. & Col. Trac. Co. v. Murphy*, 1.

Order of contempt imports verity, and presumption obtains that defendant failed to prove inability to pay alimony judgment. See *In re Whallon*, 80.

Primaries—Probate Court.

PRIMARIES—

Deputy state supervisors of elections entitled to compensation according to number of elections, when. See *Nussdorfer v. State, ex rel. Miller*, 121.

PRINCIPAL AND AGENT—

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgment, executed without authority. See *Jackson v. Foundry & Machine Co.*, 171.

Agent of vendor cannot recover additional compensation for resale of goods, without consent of both principals, when. See *Pagel v. Creasy et al.*, 199.

Affidavit in replevin may be verified by agent or attorney of plaintiff—Sections 11358 and 12052, General Code. See *Smith v. Feasley*, 242.

Courts will reform description of property in fire insurance policy, when—Contracts construed most strongly against person preparing same. See *Machine Tool Co. v. Fire Ins. Co.*, 313.

The Ford Motor Co. contract is not violative of the Sherman anti-trust law or against public policy—Under such limited-agency contract the agent cannot convey title. See *Orebaugh v. New*, 404.

PRIORITY—

Judgment for alimony relates back to date of filing petition and allowance for restraining order against lands, and defeats lien of another judgment, when. See *Loan & Bldg. Co. v. Concrete Co.*, 43.

PRIVILEGED PUBLICATIONS—

Sections 11343-1 and 11343-2, General Code, making publications of administrative, legislative and judicial proceedings privileged, are constitutional. See *Heimlich v. Dispatch Ptg. Co.*, 394.

PROBATE COURT—

Guardian not liable in representative capacity on contract with third person for services rendered ward or estate, when. See *Payne v. Rech, Gdn.*, 327.

Probate Court—Proceedings in Error.

PROBATE COURT—Continued.

Question of jurisdiction on appeal from refusal of probate court to appoint administrator, cannot be raised after such appointment by common pleas court, when. See *Bault, Admr., v. Ames et al.*, 374.

PROCEEDINGS IN AID—

Exemption in lieu of homestead—Concealment of property not in custody of court—Thurber & Browning, partners, entered into a contract with the state of Ohio to build a road known as the New Richmond Turnpike for the sum of \$12,000, and thereafter assigned this contract to Mary B. Bolan. The assignment was not made a matter of record, and \$1,183.40 was paid to Thurber & Browning on account of work done on the road by Mary B. Bolan. Under the contract the state was to retain 15 per cent. of the estimates until the work was finally completed, and under this provision \$208.85 was retained by the state. *Held:* In a proceeding in aid of execution to reach the property of John M. Bolan, husband of Mary B. Bolan, the \$208.85 retained by the state was the property of Mary B. Bolan. Under the above-stated facts, the doctrine—that where a debtor entitled to exemption in lieu of a homestead conceals money and property which he has a right to have at the time of the examination, and has other property in the custody of the court, his concealment of property not in the custody of the court should be deemed to be an election on his part to take that property as a part of his claim in lieu of a homestead—has no application. *Bolan v. Mitchell Brick Co.*, 166.

PROCEEDINGS IN ERROR—

Weight of evidence—Review of judgment of justice of peace—By virtue of the provisions of Section 10961, General Code, final judgments rendered before a justice of the peace, whether tried with or without a jury, may be reviewed on the weight of the evidence by proceedings in error. *N. Y. Cent. Rd. Co. v. Peak*, 399.

Reviewing court may require reproduction of moving picture film attached as exhibit to bill of exceptions, when. See *Duncan, Recr., v. Kiger*, 57.

Order of contempt imports verity, and presumption obtains that defendant failed to prove inability to pay alimony judgment—

Proceedings in Error—Promissory Notes.

PROCEEDINGS IN ERROR—Continued.

Habeas corpus cannot be used to review errors of court, when. See *In re Whallon*, 80.

Divorce decree not subject to review, when—Validity of marriage may be challenged in alimony proceeding, when—Evidence of prior marriage competent, when. See *Pappalardo et al. v. Pappalardo*, 291.

Reviewing court will not reverse where jury was properly charged as to whether release or settlement was bar to action for damages, when. See *O'Grady v. City of Newark*, 388.

Petition in error, to review conviction for unlawful sale of intoxicating liquors, cannot be filed without leave of court of appeals—Sessions of court and time for filing application. See *Moorey v. State*, 462.

PROHIBITION—

1. *Not writ of error*—The writ of prohibition cannot be made a substitute for a proceeding in error, and in order to invoke this writ there must be an absolute want of jurisdiction. *K. & M. Ry. Co. v. Common Pleas Court*, 244.

2. *Want of jurisdiction prerequisite to writ*—Jurisdiction determined by pleadings, when—Jurisdiction is determined by the pleadings, and when the petition contains an averment sufficient to invoke the jurisdiction of the court, the question of jurisdiction must be met by tendering an issue of fact which the court has jurisdiction to decide and the decision of which may be reviewed on error. This rule is not changed by an admission of counsel that the averment in question is not supported by the facts. Under such conditions the remedy is error and not prohibition. *Ib.*

PROMISSORY NOTES—

Defense does not lie that note without consideration because executed, without interest, in payment of life insurance policy, and therefore violates Section 9404, General Code, forbidding rebates. See *McDonald & Frasier v. Schervish*, 88.

Prejudicial error to fail to charge jury as to defenses of want and failure of consideration, fraud and burden of proof, when. See *Klein & Heffelman Co. v. Peterman*, 145.

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess

Promissory Notes—Public Roads.

PROMISSORY NOTES—Continued.

judgment, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

PROXIMATE CAUSE—

Negligence not attributed by mere use of chain-driven automobile truck, where injury results from plaintiff assuming dangerous position, when. See *Farrell v. Roche-Bruner Bldg. Co.*, 98.

PUBLICATION—

Sections 11943-1 and 11943-2, General Code, making publication of administrative, legislative and judicial proceedings privileged, are constitutional. See *Heimlich v. Dispatch Ptg. Co.*, 394.

Newspaper publication sufficient notice of action by taxing authorities, when. See *Helmers et al. v. McCarthy et al.*, 423.

PUBLIC FUNDS—

Sufficiency of allegations that funds available in county treasury to pay claim sued on. See *Nussdorfer v. State, ex rel. Miller*, 121.

PUBLIC OFFICERS—

Public officers not entitled to additional compensation because new duties imposed, when—Employment of city engineer by rapid transit board of Cincinnati. See *Rogers v. Cincinnati*, 218.

PUBLIC POLICY—

The Ford Motor Co. contract is a limited-agency contract, not violative of the Sherman anti-trust law or against public policy. See *Orebaugh v. Neu*, 404.

PUBLIC ROADS—

Failure to give land owner notice of establishment of public county road, does not invalidate proceedings for laying out road, when. See *Harkness & Cowing Co. v. St. Bernard*, 369.

Purchase—Railroads.

PURCHASE—

Realty acquired by payment of sum stipulated in will creates estate by purchase and not by devise, when. See *Bright v. Organ et al.*, 281.

RAILROADS—

Demurrage charges—Average agreement—Act of God—Consignee not liable, when—Car demurrage rules which refer to the bunching of cars and to the delivery of same in accumulated numbers in excess of daily shipments, as the result of the act or neglect of any railroad, do not apply where the bunching of cars and consequent delivery in accumulated numbers are due to an "act of God." An agreement by which a shipper or receiver waives his right to cancellation or refund of demurrage charges under such rules does not govern when the delay was due to the flood of March, 1913, and not to the act or neglect of any railroad. *Joslin-Schmidt Co. v. B. & O. S. W. Rd. Co.*, 193.

Degree of negligence by both employer and employe is jury question—Scope of employment is jury question—Presumption that both parties free from negligence. See *Cin. & Col. Trac. Co. v. Murphy*, 1.

One in act of boarding car is a passenger and entitled to recover damages for injuries, when. See *Cincinnati Traction Co. v. Weber*, 17.

Liability for premature starting of car before passenger alights. See *Cincinnati Traction Co. v. Frank*, 112.

Warehouseman liable where his negligence commingled with act of God to produce damage to goods, but excused for failure to exercise ordinary care, when. See *B. & O. S. W. Rd. Co. v. Wuest*, 127.

Street railway company liable to passenger who was given wrong transfer by one conductor and ejected by another conductor, when. See *Diehl v. Cincinnati Traction Co.*, 151.

Consignor liable for demurrage charges where consignee refuses to accept shipment, when. See *Moores Lime Co. v. N. & W. Ry. Co.*, 159.

Railroad company not liable for cost of relocation of gas mains necessitated by change of grade of vacated street, when. See *C., N. O. & T. P. Ry. Co. v. Union Gas & Elec. Co.*, 218.

Railroads—Real Property.

RAILROADS—Continued.

Traction company not negligent in ejecting intoxicated passenger for nonpayment of fare, when. See *Simms v. Stark Elec. Ry. Co.*, 264.

Shipper and carrier bound by rates filed under interstate commerce act—Liability of shipper after payment of misquoted rate. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

Railroads required to exercise ordinary care toward person assisting passenger entering car—Notice of presence of person in car. See *Mahoning Val. Ry. Co. v. Gors*, 474.

RAPID TRANSIT COMMISSIONERS—

City engineer employed as board's engineer—Not entitled to additional compensation, when—Under the provisions of Section 4000-18, General Code (106 O. L., 286), being the third section of the act providing for the creation of a board of rapid transit commissioners in cities, the board of rapid transit commissioners of the city of Cincinnati at its option may employ an engineer who is not holding a position in the public service of the city of Cincinnati and fix his compensation, or may designate the engineer of the city of Cincinnati as its engineer, but in so doing cannot allow the latter any additional compensation. *Rogers v. Cincinnati*, 218.

RATES—

Shipper and carrier bound by rates filed under interstate commerce act—Liability of shipper after payment of misquoted rate. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

RATIFICATION—

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgment, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

REAL PROPERTY—

Judgment for alimony relates back to date of filing petition and allowance of restraining order against lands, and defeats lien of another judgment, when. See *Loan & Bldg. Co. v. Concrete Co.*, 49.

Real Property.

REAL PROPERTY—Continued.

Notice by lessee of intention to extend term, not necessary, when—Term of tenant at sufferance—Possession prerequisite to action to quiet title—Injunction not proper remedy, when. See *Harlan v. Veidt*, 45.

Where lease forfeited for nonpayment of rent, lessor does not waive right to enforce forfeiture by claiming under mortgage, by demanding judgment for accrued rent or by procuring receiver in foreclosure proceedings, when. See *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

Continuing in possession after expiration of term, without express notice to lessor, renders lessee liable for rent for full renewal period, when. See *Gross v. Clauss*, 140.

Injunction lies where land owner not made party to condemnation proceedings or has not received compensation, when. See *State, ex rel., v. Brenner*, 209.

After-acquired realty passes under residuary clause of will, when. See *Strock v. Strock et al.*, 275.

Realty acquired by payment of sum stipulated in will creates estate by purchase and not by devise, when. See *Beight v. Organ et al.*, 281.

Evidence required to engraft trust on land, under claim for funds advanced toward joint purchase. See *Wagner v. Wagner et al.*, 297.

Will executed in pursuance of oral agreement, and although revoked, may be enforced by devisee as a contract, when—Enforcement against holder of realty. See *Ralston v. McBurney et al.*, 303.

A wife who survives devisee, but dies before conditional devise operative, not entitled to dower—Sale of prospective interest by contingent devisee does not defeat claim of his son, when. See *Parthe et al. v. Parthe et al.*, 317.

Proof necessary to sustain action against municipality for damages resulting from change in street grade. See *Middletown v. Doty*, 333.

Failure to give land owner notice of establishment of public county road, does not invalidate proceedings for laying out road, when. See *Harkness & Cowing Co. v. St. Bernard*, 369.

Liability of receiver for rent of real estate leased before receivership. See *Andrews v. Beigel, Recr.*, 427.

Real estate unnecessary for mechanic's lien to attach—Lien by vendor on machines. See *Rule v. Automatic News Co.*, 450.

Rebates—Releases.

REBATES—

Defense that note without consideration because executed, without interest, in payment of life insurance policy, and violates Section 9404, General Code, forbidding rebates. See *McDonald & Frasier v. Schervish*, 88.

RECEIVERSHIP—

1. *Rents—Payment before assets distributed*—Where real estate is occupied and used by a receiver in the operation of a business under the direction of the court, the rental or compensation for the use of the property becomes an expense incident to the administration of the receivership, and, like other costs, is to be paid before the assets of the debtor are distributed among the creditors. *Andrews v. Beigel, Recr.*, 427.
2. *Leases—Continuance or rescission—Liability for rents*—Where before the appointment of a receiver property has been held under lease, and the receiver takes possession, he will be given a reasonable time to determine whether he will accept under the lease or not. If he does so accept, he will be bound by the terms of the lease. If he does not accept under the lease and no other terms are made with the landlord, he will be required to pay for the time he occupies the premises a reasonable compensation not less than the rate of rental stipulated in the lease. *Ib.*

RECORDS—

Equivocal or ambiguous entry upon court docket or journal may be explained by parol evidence, when. See *James v. Hotel Honing Co.*, 162.

Technical precision not required of records of county commissioners. See *State, ex rel., v. Commissioners*, 440.

REFORMATION—

Courts will reform description of property in fire insurance policy, when—Contracts construed most strongly against person preparing same. See *Machine Tool Co. v. Fire Ins. Co.*, 313.

RELEASES—

1. *Personal injury—Receipt admissible in evidence, when*—A receipt purporting to be a release from the claim sued on, when properly identified, is competent as evidence under the cir-

Releases—Remedies.

RELEASES—Continued.

- cumstances presented by this case, but its sufficiency and weight are matters for determination by the jury. *O'Grady v. City of Newark*, 388.
2. *Bar to action—Reversals—Charge to jury*—A reviewing court will not disturb the finding of a jury as to whether or not the purported settlement is a bar to the plaintiff's action, where the jury has been instructed that the payment made to plaintiff or to some one for him does not constitute a defense to the action if the settlement was made at a time when the plaintiff was in such a mental condition, either by reason of his injuries or from opiates, that he did not understand the nature and effect of the alleged settlement. *Ib.*

REMEDIES—

- Equity cannot be invoked where remedy at law is adequate—
Question of title cannot be raised by injunction, when. See *Harlan v. Veidt*, 45.
- Habeas corpus* cannot be used to review errors of court, when. See *In re Whallon*, 80.
- Injunction lies where land owner not made party to condemnation proceedings or has not received compensation, when. See *State, ex rel., v. Brenner*, 209.
- Writ of prohibition not writ of error—Jurisdiction determined by pleadings, and admissions of counsel insufficient to defeat jurisdiction. See *K. & M. Ry. Co. v. Common Pleas Court*, 244.
- Receipt of award from workmen's compensation fund not bar to action by employe against joint tort-feasor, when. See *Ohio Trac. Co. v. Washington*, 273.
- Guardian not liable in representative capacity on contract with third person for services rendered ward or estate, when. See *Payne v. Rech, Gdn.*, 327.
- Injunction lies against improvement or repair of sidewalk authorized by council, when. See *Thompson v. Cincinnati*, 420.
- Legal remedies must be exhausted before injunction lies against illegal taxation. See *Helmers et al. v. McCarthy et al.*, 423.
- Actions for permanent or continuing trespass or nuisance, and statute of limitations. See *Louisville Brick Co. v. Calmelat*, 435.

*Remedies—Res Adjudicata.***REMEDIES—Continued.**

Discretion of county commissioners will not be interfered with, by injunction, when. See *State, ex rel., v. Commissioners*, 440.

Special assessments may be enjoined under Section 12075, General Code, although no complaint filed under Section 3848, General Code. See *Kelly v. Cincinnati*, 466.

RENEWALS—

Continuing in possession after expiration of term, without express notice to lessor, renders lessee liable for rent for full renewal period, when. See *Gross v. Claus*, 140.

RENTS—

Where lease forfeited for nonpayment of rent, lessor does not waive right to enforce forfeiture by claiming under mortgage, by demanding judgment for accrued rent or by procuring receiver in foreclosure proceedings, when. See *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

Continuing in possession after expiration of term, without express notice to lessor, renders lessee liable for rent for full renewal period, when. See *Gross v. Claus*, 140.

Liability of receiver for rent of real estate leased before receivership. See *Andrews v. Beigel, Recr.*, 427.

REPLEVIN—

Sufficiency of affidavit—Verified by attorney for plaintiff—An affidavit in replevin is not a pleading, and its verification is not governed by Section 11858, General Code, limiting the causes in which the verification may be by an agent or attorney, but rather by Section 12052, making an affidavit of an agent or attorney of the plaintiff sufficient. *Smith v. Feasley*, 242.

RES ADJUDICATA—

Equity decree a bar to second action, when—The judgment in an equity case in which the issues joined were tried on their merits and the court found on said issues for the defendant and dismissed the petition, is a complete bar and proper defense to a second action involving the same issues. *Klein & Hefelman Co. v. Peterman*, 145.

Residuary Clause—Sales.

RESIDUARY CLAUSE—

After-acquired realty passes under residuary clause of will, when. See *Strock v. Strock et al.*, 275.

RESOLUTIONS—

Special assessment defeated where council fails to pass resolution of necessity for street improvement. See *Kelly v. Cincinnati*, 486.

RESTRAINT OF TRADE—

The Ford Motor Co. contract is a limited-agency contract, not violative of the Sherman anti-trust law or against public policy. See *Orebaugh v. Neu*, 404.

REVERSALS—

Failure to give copy of obscene photograph or excuse omission from indictment, within curative provisions of Section 13581, General Code, and not reversible error, when. See *Charville v. State*, 236.

Reviewing court will not reverse where jury was properly charged as to whether release or settlement was bar to action for damages, when. See *O'Grady v. City of Newark*, 388.

ROADS—

Question for jury whether barricaded highway is a closed road, when. See *Gregg et al. v. Clapham et al.*, 363.

Failure to give land owner notice of establishment of public county road, does not invalidate proceedings for laying out road, when. See *Harkness & Cowing Co. v. St. Bernard*, 369.

SALARY—

Public officer not entitled to additional compensation because new duties imposed, when—Employment of city engineer by rapid transit board of Cincinnati. See *Rogers v. Cincinnati*, 218.

SALES—

Under The Ford Motor Co. contract the agent only solicits purchasers and cannot convey title. See *Orebaugh v. Neu*, 404.

Seller may have mechanic's lien on machine sold, when. See *Rule v. Automatic News Co.*, 459.

Schools—Settlement.

SCHOOLS—

*Consolidation—Jurisdiction—County boards of education over village school districts—Section 4684 et seq., General Code—*A county board of education has authority to dissolve two village school districts and consolidate them into one, in the absence of procedure on the part of said districts under Sections 4688 and 4688-1, General Code, which would exempt them from such action. *Fisher v. Whittus et al.*, 415.

SCIENTER—

Liability of owner or harbinger of dog for injuries inflicted. See *Mehmert v. Kelso*, 69.

SCOPE OF EMPLOYMENT—

Whether employe, who had reported for duty but had not begun work, was acting within scope of employment is jury question. See *Cin. & Cols. Trac. Co. v. Murphy*, 1.

SERVICES—

Conversations between witness and decedent inadmissible in action against executor for services rendered decedent, when—Jurisdiction of Cincinnati municipal court. See *Keck, Exr., v. Bahlke*, 246.

No inference that compensation received during lifetime of decedent was in full payment for services, when—Action against estate not barred by absence of express contract, when. See *Leen, Admr., v. Leen*, 254.

Agreement to compensate by will may be enforced against holder of real estate, when. See *Ralston v. McBurney et al.*, 308.

Guardian not liable in representative capacity on contract with third person for services rendered ward or estate, when. See *Payne v. Rech, Gdn.*, 327.

SESSION OF COURT—

Sessions of court of appeals and time for filing application for leave to file petition in error—Intoxicating liquors. See *Moorey v. State*, 462.

SETTLEMENT—

Acceptance of check endorsed "In settlement in full of account" constitutes accord and satisfaction, defeating action by creditor, when. See *Bettman et al. v. Sporkin et al.*, 23.

Settlement—Special Assessments.

SETTLEMENT—Continued.

Bad faith not shown by averments of petition to recover from indemnity company difference between employe's verdict and proposed settlement with employer. See *Wire Spring Co. v. Assurance Corp.*, 344.

Release from damages for personal injury admissible in evidence, but sufficiency and weight are jury questions—Charge to jury as to release being bar to action. *O'Grady v. City of Newark*, 388.

SHERMAN LAW—

The Ford Motor Co. contract is a limited-agency contract, not violative of the Sherman anti-trust law or against public policy. See *Orebaugh v. New*, 404.

SIDEWALKS—

Power of city council—Necessity for improvement or repair—Arbitrary action by city council—Power of court of equity to intervene—The power to determine when it is necessary to improve or repair a sidewalk is vested in the council of a city, but this power cannot be exercised in an arbitrary manner regardless of the public necessity or the rights of the property owners. A court of equity will intervene to prevent arbitrary action amounting to a manifest abuse of discretion. *Thompson v. Cincinnati*, 420.

Cause of action against municipality not stated by petition alleging injuries caused by slipping on 10-inch inclined sidewalk covered with ice, when. See *Ritter v. City of Toledo*, 72.

Proof necessary to sustain action against municipality for damages resulting from change in street grade. See *Middletown v. Doty*, 333.

SLANDER AND LIBEL—

Sections 11343-1 and 11343-2, General Code, making publication of administrative, legislative and judicial proceedings privileged, are constitutional. See *Heimlich v. Dispatch Ptg. Co.*, 394.

SPECIAL ASSESSMENTS—

Assessment defeated where council fails to pass resolution of necessity—Special street assessments—Grading—Benefits—Com-

Special Assessments—Street Railroads.

SPECIAL ASSESSMENTS—Continued.

mingling of plans—Remedy of property owner. See *Kelly v. Cincinnati*, 466.

SPECIAL FINDINGS—

Trial court may require special findings of facts by jury, when—
Special findings control over general verdict, when. See *Simms v. Stark Elec. Ry. Co.*, 264.

SPECIFIC PERFORMANCE—

Will executed in pursuance of oral agreement, and although revoked, may be enforced by devisee as a contract, when—
Enforcement against holder of realty. See *Ralston v. McBurney et al.*, 303.

STATUTES OF LIMITATION—

Statutes of limitation inapplicable to defenses not involving set-off or counterclaim. See *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

Actions for permanent or continuing trespass or nuisance, and statute of limitations. See *Louisville Brick Co. v. Calmeslat*, 435.

STOCKHOLDERS—

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgment, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

STOCKS AND BONDS—

Inter vivos gift of certificates, subscribed and delivered but not endorsed by donor, is completed, when. See *EWatt, Admr. v. Ames et al.*, 374.

STREET RAILROADS—

One in act of boarding car is a passenger and entitled to recover damages for injuries, when. See *Cincinnati Traction Co. v. Weber*, 17.

Liability for premature starting of car before passenger alights. See *Cincinnati Traction Co. v. Frank*, 112.

Street Railroads—Streets and Alleys.

STREET RAILROADS—Continued.

Street railway company liable to passenger who was given wrong transfer by one conductor and ejected by another conductor, when. See *Diehl v. Cincinnati Traction Co.*, 151.

Traction company not negligent in ejecting intoxicated passenger for nonpayment of fare, when. See *Simms v. Stark Elec. Ry. Co.*, 264.

Railroads required to exercise ordinary care toward person assisting passenger entering car—Notice of presence of person in car. See *Mahoning Val. Ry. Co. v. Gors*, 474.

STREETS AND ALLEYS—

*Vacation of street—Conditional order of vacation—Rights as to existing gas mains—Change in grade of street after vacation—Cost of changing location of gas mains—*When a city street in which a gas main has been placed with the consent of the city is vacated by order of court at the petition of the owner of all the abutting real estate, upon the condition that such owner will at all times permit the company owning the gas main to enter upon the vacated street for the purpose of laying, keeping in repair, changing or removing its main, and such owner thereafter finds it necessary to change the grade of the vacated street, the owner is not liable to the company owning the gas main for the cost of changing the location of the main to conform to the new grade. *C., N. O. & T. P. Ry. Co. v. Union Gas & Elec. Co.*, 218.

Cause of action against municipality not stated by petition alleging injuries caused by slipping on 10-inch inclined sidewalk covered with ice, when. See *Ritter v. City of Toledo*, 72.

Degree of proof to sustain injunction against special street assessments. See *Cincinnati Ice Co. v. Cincinnati*, 109.

Proof necessary to sustain action against municipality for damages resulting from change in street grade. See *Middletown v. Doty*, 333.

Injunction lies against improvement or repair of sidewalk authorized by council, when. See *Thompson v. Cincinnati*, 420.

Assessment defeated where council fails to pass resolution of necessity—Special street assessments—Grading—Benefits—Commingleing of plans—Remedy of property owner. See *Kelly v. Cincinnati*, 466.

Sufferance—Taxation.

SUFFERANCE—

Tenant at sufferance has no term, but is in by forbearance of landlord to act. See *Harlan v. Veidt*, 45.

SUSPENDED SENTENCE—

Judge not authorized to set aside suspended sentence after expiration of period of original sentence. See *In re Pontius*, 249.

TARIFFS—

Shipper and carrier bound by rates filed under interstate commerce act—Liability of shipper after payment of misquoted rate. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

TAXATION—

1. *Injunction—Legal remedies to be exhausted, when*—A party seeking relief from an alleged illegal and unjust taxation value must first exhaust all his legal remedies before resorting to a court of equity; and where the law provides the tribunal to which he can appeal for relief, such as a board of complaints, state tax commission or board of revision, he must avail himself of such opportunity before he can be heard in a court of equity. *Helmers et al. v. McCarthy et al.*, 423.

2. *Notice—Valuations—Newspaper publication sufficient, when*—Publication in a newspaper, as provided by law, of the fact that the taxing authorities had finished their work and that the same was open for inspection and objection is sufficient to charge a taxpayer with notice of the action of the assessors. *Ib.*

3. *Complaints—Failure to file—Board of complaints overworked*—The fact that a board of complaints had more work than it could and did perform does not relieve a taxpayer from the duty of first filing complaint with such board. *Ib.*

Degree of proof to sustain injunction against special street assessments. See *Cincinnati Ice Co. v. Cincinnati*, 109.

Assessment defeated where council fails to pass resolution of necessity—Special street assessments—Grading—Benefits—Commingleing of plans—Remedy of property owner. See *Kelly v. Cincinnati*, 466.

Term of Court—Transfers.

TERM OF COURT—

Sessions of court of appeals and time for filing application for leave to file petition in error—Intoxicating liquors. See *Moorey v. State*, 462.

TILING DITCH—

Request for tiling ditch is unnecessary where township trustees are hearing petition therefor, when—Trustee, as individual land owner, may sign petition for improvement, when. See *Trustees of Wilson Tp. v. Gilbert*, 39.

TIME—

Sessions of court of appeals and time for filing application for leave to file petition in error—Intoxicating liquors. See *Moorey v. State*, 462.

TITLE—

Possession prerequisite to maintain action to quiet title, when—Injunction not proper remedy, when. See *Harlan v. Veidt*, 45.
Realty acquired by payment of sum stipulated in will creates estate by purchase and not by devise, when. See *Beight v. Organ et al.*, 281.

Under the Ford Motor Co. contract the agent only solicits purchasers and cannot convey title. See *Orebaugh v. New*, 404.

TORTS—

Liability of owner or harbinger of dog for injuries inflicted. See *Mehmert v. Kelso*, 69.

Receipt of award from workmen's compensation fund not bar to action by employe against joint tort-feasor, when. See *Ohio Trac. Co. v. Washington*, 273.

TOWNSHIP TRUSTEES—

Request for tiling ditch is unnecessary where township trustees are hearing petition therefor, when—Trustee, as individual land owner, may sign petition for improvement, when. See *Trustees of Wilson Tp. v. Gilbert*, 39.

TRANSFERS—

Street railway company liable to passenger who was given wrong transfer by one conductor and ejected by another conductor, when. See *Diehl v. Cincinnati Traction Co.*, 151.

Trespass—Trial Practice.

TRESPASS—

Actions for permanent or continuing trespass or nuisances, and statute of limitations. See *Louisville Brick Co. v. Calmelat*, 435.

TRIAL PRACTICE—

1. *Special findings of fact by jury*—Trial court may require same, when—It is within the discretionary right of the trial court, even against the objection and exception of both parties, to require the jurors, if they render a general verdict, specifically to find upon particular written questions of fact and return written findings thereon. *Simms v. Stark Elec. Ry. Co.*, 364.

2. *Special findings control over general verdict*—If the special findings of fact returned by the jury in obedience to the direction of the court, are inconsistent with the general verdict, the former shall control, and it is not error for the trial court to enter judgment thereon. *Id.*

Degree of negligence by both employer and employe and scope of employment are jury questions—Presumption that both parties free from negligence. See *Cin. & Col. Trac. Co. v. Murphy*, 1.

Charge to jury in action for damages by one injured when about to board car—Effect of incorporating entire petition in charge. See *Cincinnati Traction Co. v. Weber*, 17.

Model of machine admissible in evidence, when—Charge to jury as to comparative negligence and apportionment of damages—Assumption of risk of stumbling over parts of machine. See *Reeves Bros. Co. v. Cochli*, 82.

Reviewing court may require reproduction of moving picture film attached as exhibit to bill of exceptions, when. See *Duncan, Recr., v. Kiger*, 57.

Inherent power and authority of courts to enforce decrees and orders by contempt proceedings. See *In re Whallon*, 80.

Memorandum made by witness after event took place and concerning which his memory is extinguished, is inadmissible, when. See *Cincinnati Traction Co. v. Hackett*, 97.

Slightest evidence precludes court from charging jury as to want of evidence of material fact—Injury as cause of appendicitis. See *Cincinnati Traction Co. v. Frank*, 112.

Trial Practice—Trustees of Township.

TRIAL PRACTICE—Continued.

Prejudicial error to fail to charge jury as to defenses of want and failure of consideration, fraud and burden of proof, when. See *Klein & Heffelman Co. v. Peterman*, 145.

In action on judgment, parol evidence admissible to show that partnership misdescribed as a corporation, when. See *Jackson v. Foundry & Machine Co.*, 171.

Courts will take judicial notice that flood of March, 1913, was an act of God, when. See *Joslin-Schmidt Co. v. B. & O. S. W. Rd. Co.*, 193.

Authority of trial judge to correct errors of judge who rules on interlocutory matters. See *Pagel v. Creasy et al.*, 204.

Conversations between witness and decedent inadmissible in action against executor for services rendered decedent, when. See *Keck, Exr., v. Bahlke*, 246.

Defendant in alimony proceeding may establish invalidity of marriage by evidence of prior marriage, when. See *Pappalardo et al. v. Pappalardo*, 291.

Evidence required to engraft trust on land, under claim for funds advanced toward joint purchase. See *Wagner v. Wagner et al.*, 297.

Proof necessary to sustain action against municipality for damages resulting from change in a street grade. See *Middletown v. Doty*, 338.

Charge to jury as to speed of motorcycle which collided with barricade in road undergoing repairs—Imputed negligence. See *Gregg et al. v. Clapham et al.*, 363.

Acts necessary to constitute election by widow to take under will. See *Ewalt, Admr., v. Ames et al.*, 374.

Release from damages for personal injury admissible in evidence, but sufficiency and weight are jury questions—Charge to jury as to release being bar to action. *O'Grady v. City of Newark*, 388.

Technical precision not required of records of county commissioners. See *State, ex rel., v. Commissioners*, 440.

Verdict not to be directed in will contest, when. See *Kammann v. Kammann*, 455.

TRUSTEES OF TOWNSHIP—

Request for tiling ditch is unnecessary where township trustees are hearing petition therefor, when—Trustee, as individual land

Trustees of Township—Vendor and Vendee.

TRUSTEES OF TOWNSHIP—Continued.

owner, may sign petition for improvement, when. See *Trustees of Wilson Tp. v. Gilbert*, 39.

TRUSTS—

Evidence required to establish—Claim for funds advanced—To purchase land held jointly—A trust can be grafted on land, held by a deed absolute on its face, only by evidence which is clear and of the most convincing character, and a claim of a lien on the proceeds arising from the sale in partition of land so held, on account of money advanced for its purchase, will be denied where the evidence as to the claim falls short of being of a clear and convincing character. *Wagner v. Wagner et al.*, 297.

TUBERCULOSIS HOSPITALS—

1. *Constitutional law*—The district tuberculosis hospital act is constitutional. *State, ex rel., v. Brenner*, 209.
2. *Discretion of board—Not subject to court control, when*—The joint board created by such act is invested with a discretion which cannot be controlled by the courts, at least in the absence of fraud or gross abuse of discretion. *Ib.*
3. *Building not a nuisance per se*—The location and construction of a tuberculosis hospital building does not constitute a nuisance *per se*. *Ib.*

VACATED STREETS—

Railroad company not liable for cost of relocation of gas mains necessitated by change of grade of vacated street, when. See *C., N. O. & T. P. Ry. Co. v. Union Gas & Elec. Co.*, 213.

VAGRANTS—

Municipal ordinance punishing vagrancy not invalid because word "loitering" used in defining offense, when. See *Bader, Supt., v. McCartin*, 76.

VENDOR AND VENDEE—

Agent of vendor cannot recover additional compensation for resale of goods, without consent of both principals, when. See *Pagel v. Creasy et al.*, 199.

Vendor and Vendee—Want of Consideration.

VENDOR AND VENDEE—Continued.

Seller may have mechanic's lien on machine sold, when. See *Rule v. Automatic News Co.*, 450.

VERDICT—

Trial court may require special findings of facts by jury, when—
Special findings control over general verdict, when. See *Simms v. Stark Elec. Ry. Co.*, 264.

VERIFICATION—

Affidavit in replevin may be verified by agent or attorney of plaintiff—Sections 11858 and 12052, General Code. See *Smith v. Feasley*, 242.

VILLAGE SCHOOLS—

County board of education may dissolve two village school districts and consolidate them, when. See *Fisher v. Whittus et al.*, 415.

WAIVER—

Where lease forfeited for nonpayment of rent, lessor does not waive right to enforce forfeiture by claiming under mortgage, by demanding judgment for accrued rent or by procuring receiver in foreclosure proceedings, when. See *Nasby Bldg. Co. v. Walbridge Bldg. Co.*, 104.

Question of jurisdiction on appeal from refusal of probate court to appoint administrator, cannot be raised after such appointment by common pleas court, when. See *Ewalt, Admr., v. Ames et al.*, 374.

Want of jurisdiction waived by appearing and consenting to continuance by justice of peace, when. See *Cluston v. Smithson*, 482.

WANT OF CONSIDERATION—

Defense that note without consideration because executed, without interest, in payment of life insurance policy, and violates Section 9404, General Code, forbidding rebates. See *McDonald & Frasier v. Schervish*, 88.

Prejudicial error to fail to charge jury as to defenses of want and failure of consideration, fraud and burden of proof, when. See *Klein & Heffelman Co. v. Peterman*, 145.

Warehousemen—Wills.

WAREHOUSEMEN—

1. *Act of God—Commingled with negligence—Liability for damage to goods*—A warehouseman is liable for damages done by an unprecedented flood to goods stored in his warehouse where his own negligence commingling with the act of God as an active and cooperative element resulted in damage to the goods. *B. & O. S. W. Rd. Co. v. Wuest*, 127.
2. *Act of God—Failure to exercise ordinary care excused, when*—A negligent warehouseman can be excused for failure to exercise ordinary care only in cases where the superior force of the act of God would have produced the same damage whether the warehouseman had been negligent or not. *Ib.*

WARRANTS TO CONFESS—

Principles of ratification by acquiescence and imputed knowledge bind corporation for judgment secured on warrants to confess judgment, executed by agent without authority. See *Jackson v. Foundry & Machine Co.*, 171.

WEIGHT OF EVIDENCE—

Under Section 10361, General Code, final judgments of justice of peace may be reviewed on weight of evidence, when. See *N. Y. Cent. Rd. Co. v. Peak*, 399.

WIFE—

Second wife entitled to proceeds of policy as against children of first wife, where insurance payable to wife of insured, when. See *Sherry v. Life & Accident Assn.*, 228.

WILLS—

1. *Construction—Per capita distribution—Proportions left undetermined by testator*—As a general rule, where a testator has left undetermined the proportions in which his beneficiaries are to take, the courts, favoring equality, will direct the distribution to be *per capita* rather than *per stirpes*. *Broermann, Jr., v. Kessling*, 7.
2. *Construction—Devise to children of testator's daughters*—A testator devised certain real estate "to the children of Elizabeth Boewer and the children of Marianna Broermann and Frederick Broermann, all said children being my grandchildren, to have and to hold the same for the said grandchildren, their heirs and assigns forever." On the death of the wife of the

Wills.

WILLS—Continued.

testator, who was given a life estate in the real estate in question, there were, surviving her, two children of Elizabeth Boewer and twelve children of Marianna Broermann and Frederick Broermann. *Held*: That each of the fourteen grandchildren takes an undivided one-fourteenth of the real estate in question. *Ib.*

3. *Construction—Ambiguities latent and patent—Devise not defeated by deeds—Imperfectly executed and not delivered, when*—A specific devise of lands to the widow of the testator for life, with the remainder over to a designated beneficiary, is not defeated on the ground of ambiguity by reason of the execution by the testator of deeds covering the same lands, where the said deeds were not executed in accordance with law and were not delivered to the grantees and there is no proof showing or tending to show that they were placed in escrow. *Mateer, Exr., v. Croft, 13.*

4. *Construction—After-acquired realty—Residuary clause controls, when*—A will containing the general residuary clause, "the balance and remainder of my property of every kind and description I give and bequeath," etc., covers after-acquired real estate, and in an action for partition of said real estate it will be treated as having passed under the residuary clause. *Strock v. Strock et al., 275.*

5. *Promise to compensate by will—Specific performance—Parties*—A promise, for a valuable consideration, to make a will devising specific real estate to a certain person is valid, if evidenced as required by the statute of frauds, and, upon failure to perform the promise, specific performance may be had against any one having the title thereto except an innocent purchaser for value. *Ralston v. McBurney et al., 308.*

6. *Revocation of will devising as promised—Enforcement as contract*—A will devising real estate, executed and delivered to the devisee in pursuance of a parol agreement by which the testator for a valuable consideration agreed to devise that real estate to the devisee, can not be revoked by a subsequent will so as to escape the obligation, but may be enforced as a contract. *Ib.*

7. *Conditional devise—Event happening during devisee's lifetime—Dower not assignable to devisee's wife*—The surviving spouse of one who departed this life before the happening of the event which was made a condition to the taking effect of a

Wills—Workmen's Compensation.

WILLS—Continued.

devise in his favor, is not entitled to dower in the property so conditionally devised. *Parthe et al. v. Parthe et al.*, 317.

8. *Contingent devisee—Sale of prospective interest—Rights of his son*—The sale by a contingent devisee of his prospective interest in an estate does not defeat the claim of his son to whom one-half of the said interest was devised in case death before taking effect of the devise prevented the interest vesting in the contingent devisee. *Ib.*
 9. *Election by widow—Execution of mutual wills—Election in law and in fact*—While the law requires that the acts of a widow, in order to constitute an election by conduct on her part to take under the will of her husband, must clearly and unequivocally evince a purpose on her part so to elect, yet where the husband and wife have together deliberately planned an arrangement for the disposition of their respective estates by will, and have executed their wills to carry out that purpose, a court will be readily convinced that she has elected to take under the will. *Ewalt, Admr., v. Ames et al.*, 374.
 10. *Action to contest—Evidence—Directed verdict—Prima facie evidence—Quantum of evidence required in order to submit case to jury*—In an action to contest a will the *prima facie* evidence furnished by the order of probate must be first met and neutralized by sufficient evidence produced by the plaintiff. When this has been done, and in addition to the quantum of evidence necessary for such purpose evidence however slight is produced tending to prove the facts essential to plaintiff's case, then a motion for a directed verdict in favor of the defendant cannot be properly granted, but the case must be submitted to the jury under proper instructions. *Kammann v. Kammann*, 455.
- Realty acquired by payment of sum stipulated in will creates estate by purchase and not by devise, when. See *Beight v. Organ et al.*, 281.

WORKMEN'S COMPENSATION—

Negligence—Joint tort-feasor—Action for damages—The receipt of money by an injured employe from the state liability board of awards by virtue of the workmen's compensation law is not a bar to an action for damages against a person other than the employer whose negligence contributed to the injury. *Ohio Traction Co. v. Washington*, 278.

Writ of Prohibition—X-Ray Plate.

WRIT OF PROHIBITION—

Writ of prohibition not writ of error—Jurisdiction determined by pleadings, and admissions of counsel insufficient to defeat jurisdiction. See *K. & M. Ry. Co. v. Common Pleas Court*, 244.

X-RAY PLATE—

Concealment of X-ray plate not sufficient to justify sustaining petition for new trial on ground of newly-discovered evidence, when. See *Duncan, Recr., v. Kiger*, 57.

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